PARENTAL INVOLVEMENT LAWS AND NEW GOVERNANCE

RACHEL REBOUCHÉ*

INTRODUCTION

In August 2010, Alaskan voters approved a law mandating that young women under eighteen years old give a parent notice of their intent to have

* Assistant Professor of Law, University of Florida Levin College of Law. Many thanks to Anne Dellinger, Nancy Dowd, Paul Gugliuzza, Janet Halley, Johanna Kalb, Carol Sanger, Elizabeth Scott, Marya Torrez, the participants and organizers of the University of Baltimore Applied Feminism and Marginalized Communities Conference, and the Family Law Junior Faculty Workshop at William & Mary Law School. All errors are mine.

an abortion.[1] The ballot initiative follows litigation over the previous law,[2] intense public debate,[3] and speculation about the prospects of future challenges.[4] With the addition of Alaska, a total of thirty-seven states will have laws that require a minor to involve her parents in her abortion decision, typically either by notifying a parent or by seeking a parent's permission.[5] Thirty-five of those states permit a minor to "bypass" notice or consent requirements by allowing a minor to prove in a court hearing that she is mature or that an abortion is in her best interests.[6]

The stated objectives of parental involvement laws are to protect the health and well-being of minors and to encourage dialogue between parents and adolescents about pregnancy options.[7] Yet decades of studies urge that parental involvement laws do not meet these purposes.[8] Adding to this research, a new ethnography of professionals who implement parental involvement statutes seeks to demonstrate how notice and consent laws and the

---

[1] ALASKA STAT. § 18.16.010(a)(3) (2010); *see also Alaskan Voters Approve Parental Notification Ballot Initiative*, MEDICAL NEWS TODAY, Aug. 26, 2010, http://www.medicalnewstoday.com/articles/199006.php.

[2] *See, e.g.*, State v. Planned Parenthood of Alaska, 171 P.3d 577 (Alaska 2007) (holding the parental consent law unconstitutional).

[3] *See, e.g.*, ALASKANS AGAINST GOVERNMENT MANDATES: PROTECT OUR TEENS AND FAMILIES, http://www.facebook.com/NOon2AK (last visited Oct. 25, 2010); ALASKANS FOR PARENTAL RIGHTS, YES ON 2, http://www.alaskansforparentalrights.org/ (last visited Oct. 25, 2010).

[4] *See, e.g.*, Lisa Demer, *Voters Approve Measure Requiring Abortion Notification*, ANCHORAGE DAILY NEWS, Aug. 25, 2010, http://www.adn.com/2010/08/25/1423557/voters-approve-measure-requiring.html ("The measure's opponents said they will look into the possibility of another court challenge.").

[5] GUTTMACHER INST., PARENTAL INVOLVEMENT IN MINORS' ABORTIONS (Nov. 1, 2010), *available at* http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf. The Guttmacher report describes the parental involvement laws of thirty-four states, but omits the current laws of Maryland, Alaska, and Maine. *See* ALASKA STAT. §§ 18.16.010(a)(3), 18.16.030 (2010) (mandating parental notice and creating judicial bypass as alternative); MD. CODE ANN., HEALTH-GEN. § 20-103(a), (c) (LexisNexis 2009) (mandating notice and creating a physician waiver but not a judicial bypass); ME. REV. STAT. ANN. tit. 22 § 1597-A(2)(A-C), (6) (2004) (requiring state counseling, parental or adult family member consent, or court order via a judicial bypass hearing).

[6] *See* GUTTMACHER INST., *supra* note 5 (listing the states that have a judicial bypass, though excluding Maryland (which has a notice statute but no judicial bypass provision), Alaska, and Maine).

[7] For an example of the legislative purposes of parental involvement laws, see ALA. CODE § 26-21-1(a) (2009) ("It is the intent of the Legislature in enacting this parental consent provision to further the important and compelling state interests of: (1) protecting minors against their own immaturity, (2) fostering the family structure and preserving it as a viable social unit, and (3) protecting the rights of parents to rear children who are members of their household.").

[8] *See, e.g.*, Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 687–93 (1988) (summarizing studies showing that parental involvement laws fail to meet their stated aims because, for example, adolescents have the cognitive ability to make abortion decisions); AMANDA DENNIS ET AL., THE IMPACT OF LAWS REQUIRING PARENTAL INVOLVEMENT FOR ABORTION: A LITERATURE REVIEW 27–28 (March 2009), *available at* http://www.guttmacher.org/pubs/ParentalInvolvementLaws.pdf (summarizing studies that show abortion rates do not necessarily decrease with consent or notice laws).

judicial bypass work in practice.[9] Over the last two years, a non-profit organization, the National Partnership for Women & Families, interviewed 155 lawyers, advocates, judges, health care providers, and court clerks who assist minors in every state with parental notice or consent laws and judicial bypass petitions.[10] The National Partnership's final report makes clear that a significant population of minors cannot consult their parents for logistical or personal reasons, and, for that cohort, the judicial bypass is not a meaningful alternative.[11] In only a few places can the judicial bypass system be described as a functional process in which most minors, from any part of a state, can seek a bypass without significant delay, cost, or embarrassment.

This Article relies on the findings of the National Partnership's study, but addresses an aspect of parental involvement laws that has garnered scant scholarly attention—strategies for reform when repeal or injunction of a law is unlikely. Reproductive health and youth rights advocates have challenged consent and notice laws in court, through appeals to state legislators to repeal or revise laws, and in campaigns designed to shape public attitudes about adolescent abortion.[12] The opposition to minor's access to abortion is equally vigorous, and pro-choice advocates spend substantial energy opposing bills that would make parental involvement laws more restrictive.[13] Moreover, policies governing parental involvement are often unclear and information about the judicial bypass is not widely available.[14] Legal and clinical professionals at the state and local levels make choices based on unwritten policies driven by fears of liability, anti-abortion attitudes, or an-

---

[9] NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, BYPASSING JUSTICE: PREGNANT MINORS AND PARENTAL INVOLVEMENT LAWS 6 (2010) (on file with author) [hereinafter BYPASSING JUSTICE]. The author was an associate director of adolescent health programs at the National Partnership and co-authored BYPASSING JUSTICE with Anne Dellinger, former director of adolescent health programs. For additional information about the bypass project, see NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, www.nationalpartnership.org (last visited Oct. 25, 2010).

[10] BYPASSING JUSTICE, *supra* note 9, at 8. All study participants agreed to be interviewed on the promise of confidentiality—that neither they nor their locale would be identified. For this reason, this article does not refer to interviewees by name and does not make reference to the jurisdictions from which examples are drawn. Moreover, only members of the "reproductive health community" received copies of the report.

[11] *See* Ted Joyce, *Parental Consent for Abortion and the Judicial Bypass Option in Arkansas: Effects and Correlates*, 42 PERSP. ON SEXUAL AND REPROD. HEALTH 168, 173 (2010) (noting that ten percent of Arkansas minors seeking an abortion petitioned for a judicial bypass and comparing that with the estimate that forty percent of minors would choose not to consult parents without the consent law).

[12] *See infra* Part III (describing the three common strategies employed by reproductive rights advocates).

[13] *See infra* Part III(B) (describing, for example, the bills that pro-choice advocates oppose in state legislatures). A women's rights advocate reflected the feelings of those that oppose parental involvement by stating, "We've been down so long we don't know how to get up." NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, REPORT ON A MEETING ON THE JUDICIAL BYPASS 16 (2008) (on file with author) [hereinafter REPORT ON A MEETING] (summary of the proceedings of a national meeting of fifty experts involved in adolescent reproductive health and knowledgeable about judicial bypass).

[14] *See* BYPASSING JUSTICE, *supra* note 9, at 7–8.

tipathy for adolescent sexuality.[15] This Article explains why typical proposals for reform—to revise statutory language, to change public perceptions of the "good parent" and "bad teen," or to challenge aspects of consent or notice laws in court—have limited potential.

I argue that those interested in easing the burden that parental involvement laws impose on young women might intervene at the level of informal decision-making.[16] Insights from new governance scholarship show how influencing local relationships among gatekeepers of services can help overcome obstacles to reform. Generally, new governance is a method of law reform that "responds to critiques of rights-based, state-centered, top-down litigative and regulatory strategies by turning toward experimental, flexible, collaborative public-private partnerships and by locating lawyers as problem solvers rather than as traditional advocates."[17] The problem-solving method of new governance provides an approach that can address the complex web of state oversight, parental control, social stigma, and the discretion of individual legal actors. I temper my suggestion that new governance could play a role in reform with an assessment of its risks and limitations.[18] My purpose is not to suggest that new governance is a seamless fit for parental involvement laws or provides a clear, unproblematic path for change. My intent, rather, is to advance the current conversation among those interested in increasing minors' access to reproductive health care services and improving the operation of parental involvement laws.

Parts I and II of this Article provide background on parental consent and notice standards and relate relevant findings from the National Partnership's research. Part III explores why traditional strategies based on court or legislative intervention may not be viable avenues of change. In Part IV, I identify the risks and potential rewards of a new governance approach and reflect on background conditions that would make its application challenging. The Article concludes by offering a hypothetical model for collaboration that applies a new governance approach to the judicial bypass.

---

[15] *See infra* Part II(E) (describing state officials' confusion about or opposition to the requirements of parental involvement laws of accepting notice or granting consent for minors in state care).

[16] *See infra* Part IV(B) (relying on the recommendations of interviewees in formulating a new strategy).

[17] Douglas NeJaime, *When New Governance Fails*, 70 Ohio St. L.J. 323, 324–25 (2009); *see infra* Part IV(A) (defining new governance and describing its problem-solving potential).

[18] *See infra* Part IV(C) (considering potentially negative implications of a new governance approach).

I. The Letter of the Law: Parental Involvement Statutes

A. Background and Types of Parental Involvement

The United States Supreme Court sketched out the general requirements for parental involvement laws over thirty years ago. In its 1979 decision, *Bellotti v. Baird*, the Court considered a Massachusetts law that required parental consent before a minor elected abortion.[19] The Court held that a parental consent law must include an alternative to parental consent: minors who are mature and well-informed or for whom an abortion would be in their best interests must be able to take advantage of a process that is timely, confidential, and effective.[20] Today, in almost every state that has a parental consent or notice law, the alternative process is a court hearing where a judge determines the minor-petitioner's maturity or best interests as set out by the state's statute.[21]

State legislatures have passed parental involvement laws in forty-four states.[22] Thirty-seven states have an involvement law in force[23] with the laws of seven other states enjoined or, for one state, repealed.[24] There are basically two types of parental involvement laws—those that require the abor-

---

[19] Bellotti v. Baird, 443 U.S. 622, 650 (1979).

[20] *Id.* at 643–44.

[21] *See* Guttmacher Inst., *supra* note 5 (noting the thirty-seven states with parental involvement laws). In three states—Maryland, West Virginia, and Maine—a healthcare provider can determine when a minor is not obligated to involve a parent. Maryland (which has no judicial bypass) and West Virginia (which does) allow providers to assess maturity or best interests as a court would. Md. Code Ann., Health-Gen. I § 20-103(c) (LexisNexis 2009); W. Va. Code Ann. § 16-2F-3(c) (LexisNexis 2006). Maine's statute gives the minor the option of a bypass hearing or state-mandated counseling, which is delivered by a provider who describes, among other things, the alternatives to and risks of abortion; encourages minors to consult with parents; and records the minors' reasons for not seeking parental consent. Me. Rev. Stat. Ann. tit. 22 § 1597-A(2–4) (2004).

[22] Six states—Connecticut, Hawaii, New York, Oregon, Vermont, and Washington—and the District of Columbia have not passed a law mandating parental involvement of all minors. *See* Guttmacher Inst., *supra* note 5. A Connecticut statute provides for counseling about the value of parental notification for minors, but does not mandate it. Conn. Gen. Stat. § 19a-601 (2010).

[23] *See* Guttmacher Inst., *supra* note 5.

[24] The following six decisions enjoin the parental involvement laws in their respective states: Glick v. McKay, 937 F.2d 434 (9th Cir. 1991) (affirming lower court's enjoinment of Nevada's parental consent requirement because it did not meet the state constitutional requirements, including expediency, for such provisions); Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997) (holding that the parental consent statute was unconstitutional because it violated the right of privacy); The Hope Clinic for Women Ltd. v. Adams, No. 09-CH-38661, 2010 WL 1198356 (Ill. Cir. Mar. 29, 2010); Wicklund v. Montana, No. ADV 97-671, 1999 Mont. Dist. LEXIS 1116 (D. Mont. 1999) (finding that Montana's parental notice requirement violated equal protection); Planned Parenthood v. Farmer, 762 A.2d 620 (N.J. 2000) (holding that New Jersey's parental notification requirement violated state equal protection); N.M. Op. Att'y Gen. No. 90-19, 1990 WL 509590 (N.M.A.G. Oct. 3, 1990) (declaring New Mexico's parental notification law unenforceable because, among other reasons, the statute does not provide for a bypass procedure). New Hampshire is the only state to have repealed a parental-notification law. Press Release, N.H. Gen. Court, Senate Votes To Repeal Unconstitutional Parental

tion provider to obtain consent from the minor's parent before an abortion is performed (consent laws) and those that require the abortion provider to give a parent notice before the abortion occurs (notice laws).[25] Mississippi and North Dakota require consent from both parents, and Minnesota requires notice to both parents.[26] Oklahoma, Texas, Utah, and Wyoming require both notice and consent.[27]

Notice laws require abortion providers to give a parent either actual notice (notification delivered in person or by telephone) or constructive notice.[28] Laws typically mandate that providers give constructive notice to a parent by special delivery, which requires the addressee to present valid identification that confirms her identity upon delivery.[29] State statutes require varying time periods for constructive notice: many laws mandate 48 hours and some 72 hours before the abortion.[30] If notice is delivered in person or by telephone, typically only 24 hours notice is required.[31] For consent statutes, providers must obtain oral or written consent from the parent or adult(s) designated by statute.[32]

Common to notice and consent laws is the requirement that providers use "'reasonable means' to notify parents or to obtain consent or to learn a patient's age."[33] Statutes do not typically set out how a minor must prove her age or how providers must verify a patient's age.[34] Moreover, few states detail what evidence a parent must give to prove her relationship with the

---

Notice Law (June 7, 2007), *available at* http://www.gencourt.state.nh.us/senate/press/2007/parental%20notice%20repeal.htm.

[25] BYPASSING JUSTICE, *supra* note 9, at 10.

[26] MINN. STAT. ANN. § 144.343(Subd. 2–3) (West 2005); MISS. CODE ANN. § 41-41-53(1) (2009); N.D. CENT. CODE § 14-02.1-03.1(1)(a) (2009). North Dakota's two-parent consent only applies when both parents are living and married to each other. Mississippi law allows one parent to consent if the other is unavailable. Similarly, only one parent need receive notice in Minnesota if the other parent is dead or cannot be found.

[27] OKLA. STAT. ANN. tit. 63, § 1-740.2 (West 2010); TEX. FAM. CODE ANN. § 33.002 (Vernon 2008); TEX. OCC. CODE ANN. § 164.052(a)(19) (1999 & Vernon Supp. 2009); UTAH CODE ANN. § 76-7-304–304,5 (2008); WYO. STAT. ANN. § 35-6-118(a) (2009).

[28] BYPASSING JUSTICE, *supra* note 9, at 11. Only one state, Delaware, requires actual notice without the option of constructive notice. DEL. CODE ANN. tit. 24, § 1783 (1997).

[29] BYPASSING JUSTICE, *supra* note 9, at 11.

[30] *Id.*

[31] *Id.*

[32] Fifteen statutes specify that consent must be in writing and signed, and five of these states require notarization. *See, e.g.*, ARK. CODE ANN. §§ 20-16-803(a)(5), 803(c) (2009) (notarized consent or witnessed signature); LA. REV. STAT. ANN. § 40:1299.35.5(A)(1) (2008) (notarized consent); N.D. CENT. CODE § 14-02.1-03.1 (2009) (written consent); OKLA. STAT. ANN. tit. 63, § 1-740.2(3)(a) (West 2010) ("parent entitled to notice and consent shall provide to the physician a copy of proof of identification, and shall certify in a signed, dated, and notarized statement that he or she has been notified and consents to the abortion"); S.C. CODE ANN. § 44-41-31(A)(1) (2002) (witnessed signature); VA. CODE ANN. § 16.1-241(V) (2010) (notarized consent unless "authorized person" present with minor and provides written authorization witnessed by physician).

[33] BYPASSING JUSTICE, *supra* note 9, at 11.

[34] *Id. But see* ALASKA STAT. § 18.16.020(b) (2010) (repealed and reenacted) (detailing what reasonable steps a provider must take to give notice).

minor. For example, five state laws require the person consenting or receiving notice to present identification or documentation that establishes the relationship between the parent/guardian and the minor.[35] Arkansas, for example, requires photographic identification (with notarized written consent in lieu of in-person consent)—proof of which providers must keep for five years.[36]

Six of the thirty-seven state statutes in force allow a non-parent adult to give consent or to accept notice—generally, an adult who acts like a parent to the minor. Virginia permits consent by a "[p]erson standing in loco parentis," such as a grandparent or adult sibling, "with whom the minor regularly and customarily resides and who has care and control of the minor."[37] Wisconsin permits consent from an adult family member, such as a grandparent, aunt, uncle, or sibling, who is at least twenty-five years old.[38] Laws in Delaware, Iowa, North Carolina, and South Carolina allow a grandparent to give consent or receive notice.[39]

Finally, some statutes create specific categories of minors that do not have to comply with notice and consent standards at all. Minors sixteen or older do not need to notify a parent in Delaware, and seventeen-year-olds are exempt from the consent law in South Carolina.[40] Almost all notice or consent laws allow emancipated minors to make abortion decisions without their parents, although the definition of emancipation varies from state to state.[41] As set out in Virginia's consent statute, an emancipated minor can be a youth emancipated by a court, married or divorced, in the armed forces, or "willingly living separate and apart from her parents or guardian, with the

---

[35] ARK. CODE ANN. § 20-16-803 (2009); ALASKA STAT. § 18.16.020(b)(1) (2010) (repealed and reenacted); GA. CODE ANN. § 15-11-112 (a)(1)(A) (2008); OKLA. STAT. ANN. tit. 63, § 1-740.2(3)(a) (West 2010); TENN. CODE ANN. § 37-10-303 (2005 & Supp. 2008) ("written documentation, other than the written consent itself, that purports to establish the relationship of the parent or guardian to the minor").

[36] ARK. CODE ANN. § 20-16-803(d–e) (2009).

[37] VA. CODE ANN. § 16.1-241(V) (2010).

[38] WIS. STAT. § 48.375(4)(1) (2007–08) (providing that an adult family member may be provided with consent); WIS. STAT. § 48.375(2)(b) (2007–08) (noting that a grandparent, aunt, uncle, sister, or brother, age twenty-five or older, constitutes an adult family member).

[39] DEL. CODE ANN. tit. 24, § 1783(a) (1997); IOWA CODE ANN. § 135L.3(m)(2)(a) (West 2007) (upon "written statement submitted to the attending physician" describing "a reason for not notifying a parent and a reason for notifying a grandparent," minor may give notice to a grandparent); N.C. GEN. STAT. ANN. § 90-21.7(a)(4) (2009) ("grandparent with whom the minor has been living for at least six months immediately preceding the date of the minor's written consent" may give consent); S.C. CODE ANN. § 44-41-31(A)(1)(c)–(d) (2002) (noting that a grandparent or someone "who has been standing in loco parentis to the minor for a period not less than sixty days" may give consent).

[40] DEL. CODE ANN. tit. 24, §§ 1782(6), 1783 (1997); S.C. CODE ANN. §§ 44-41-10(m), 44-41-31 (2002).

[41] *But see* MASS. GEN. LAWS ANN. ch. 112, § 12S (West 2002) (no exception for emancipated minors). Massachusetts has a law that sets out the requirements for emancipation in making medical decisions, but this provision excludes abortion. *See* MASS. GEN. LAWS ANN. ch. 112, § 12F (West 2002).

consent or acquiescence of the parents or guardian."[42] Most statutes provide that married minors can make abortion decisions without parental involvement or a bypass.[43] Some laws define living apart in terms of a minor's ability to support herself financially outside of the parental home.[44]

In addition to independent minors, several statutes make exceptions for minors who have destructive relationships with their parents or whose pregnancies may be the result of sexual assault. For example, some statutes exempt minors from the requirements of notice or consent if they have been abused, neglected, or sexually assaulted.[45] Many of these laws apply the exemption only when the parent or guardian is the perpetrator.[46] The evidence needed to establish abuse or assault, and what a provider must do in response to learning this information, varies.[47]

Almost all states allow physicians to perform abortions without parental involvement or a judicial bypass if a minor has a medical emergency.[48] Some laws define emergency as an instance where continued pregnancy would compromise a minor's health, safety, or well-being.[49] Others are more restrictive, defining medically necessary abortions as those that are needed

---

[42] VA. CODE ANN. § 16.1-241(V) (2010).

[43] *See, e.g.*, FLA. STAT. § 390.01114(3)(b)(3) (West 2007). In most states, unemancipated adolescents under eighteen years old need parental consent or a court order to marry. *See Marriage Laws of the Fifty States, District of Columbia and Puerto Rico*, LEGAL INFO. INST., http://topics.law.cornell.edu/wex/table_marriage (last visited Oct. 26, 2010).

[44] *See, e.g.*, OHIO REV. CODE ANN. § 2919.121(A) (Lexis Nexis 2010) (defining emancipated minor as one who "has married, entered the armed services of the United States, become employed and self-subsisting, or has otherwise become independent from the care and control of her parent, guardian, or custodian").

[45] *See, e.g.*, ALA. CODE § 26-21-4(c)(4)(b) (2009); FLA. STAT. ANN. § 390. 01114(4)(d) (West 2007); N.C. GEN. STAT. ANN. § 90-21.8(e)(3) (2009); OHIO REV. CODE ANN. § 2151.85(4)(b) (LexisNexis 2007).

[46] *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2152(G)(1) (2009 & Supp. 2009) (perpetrator must be a relative, guardian, or adult who lives with the minor and the minor's mother); COLO. REV. STAT. ANN. § 12-37.5-105(b) (2010) (perpetrator must be person who would receive notice) (2009); IDAHO CODE ANN. §18-609A(7)(a) (2004 & Supp. 2009) (perpetrator must be relative, guardian, or foster parent).

[47] For example, in Wisconsin, a minor must provide a signed statement that the pregnancy is a result of sexual assault or abuse. WIS. STAT. § 48.375(4)(b)(1g) (2007–08).

[48] *See, e.g.*, OHIO REV. CODE ANN. § 2919.121(D) (LexisNexis 2010) (noting that "[i]t is an affirmative defense to any civil, criminal, or professional disciplinary claim brought under this section that compliance with the requirements of this section was not possible because an immediate threat of serious risk to the life or physical health of the minor from the continuation of her pregnancy created an emergency necessitating the immediate performance or inducement of an abortion."); R.I. GEN. LAWS § 23-4.7-4 (2009) (noting that "[w]here there is an emergency requiring immediate action, the requirements of this chapter may be waived.").

[49] *See, e.g.*, ALA. CODE § 26-21-5 (2009) (noting that consent and notice requirements are waived when the doctor finds that "a medical emergency exists that so compromises the health, safety or well-being of the mother as to require an immediate abortion"); KAN. STAT. ANN. § 65-6705(j)(1)(B) (2002) (declaring that notice is not required if "an emergency exists that threatens the health, safety or well-being of the minor as to require an abortion").

"to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function."[50]

B. Descriptions of the Judicial Bypass Process

Statutes describe in detail the process for pursuing the alternative to notice or consent—the judicial bypass. Most laws make no exceptions for young women with absent or unavailable parents.[51] For example, minors whose parents might consent or receive notice but live apart from the minor must resort to a bypass if they have no other legal guardian.[52] Statutes portray the bypass as a reasonable option for these and all minors by setting out a process that should be confidential, expeditious, and efficient—the three requirements of *Bellotti*.[53]

In keeping with the first *Bellotti* criterion, all state statutes require the bypass process to be confidential. Some statutes detail how courts must protect minors' anonymity by sealing records, using pseudonyms for petitioners, or limiting those who may participate in the hearing.[54] Other states' laws include general mandates that courts keep proceedings confidential.[55]

Per the second *Bellotti* criterion, all consent or notice statutes require a timely process[56]—a prompt hearing that will "ensure that the court may reach a decision promptly and without delay in order to serve the best interest of the pregnant woman."[57] Depending on the state's law, courts must

---

[50] *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2152(G)(2) (2009 & Supp. 2009); N.D. CENT. CODE § 14-02.1-03.1(12) (2009) (noting that abortion may be performed if it is necessary to prevent death); WYO. STAT. ANN. § 35-6-118(c) (2009) (finding that the consent and notice procedures do not apply if "the attending physician determines that an abortion is necessary to avert an imminent peril that substantially endangers" the minor's life).

[51] *But see* 18 PA. CONS. STAT. ANN. § 3206(b) (West 2000) (stating that "[i]f neither any parent nor a legal guardian is available to the physician within a reasonable time and in a reasonable manner, consent of any adult person standing in loco parentis shall be sufficient").

[52] BYPASSING JUSTICE, *supra* note 9, at 37.

[53] Bellotti v. Baird, 443 U.S. 622, 644 (1979).

[54] *See, e.g.*, KAN. STAT. ANN. § 65-6705(c) (2002) ("All persons shall be excluded from hearings . . . except the minor, her attorney and such other persons whose presence is specifically requested by the applicant or her attorney"); NEB. REV. STAT. § 71-6903(5) (2009) (requiring sealed records that will not be opened except for cause; stating that "[o]nly the pregnant woman, the pregnant woman's guardian ad litem, the pregnant woman's attorney, and a person whose presence is specifically requested by the pregnant woman . . . may attend the hearing on the petition."); WIS. STAT. § 48.257(a) (2007–08) (requiring that the petition be titled "In the Interest of Jane Doe, a person under the age of 18").

[55] *See, e.g.*, FLA. STAT. ANN. § 390.01114(4)(e) (West 2007) (noting that "[a]ll hearings under this section, including appeals, shall remain confidential and closed to the public, as provided by court rule."); NEB. REV. STAT. § 71-6903(5) (2009) (stating that "all documents . . . shall be sealed by the clerk of the court and shall not be open to any person except upon order of the court for good cause shown" and that separate sealed docket will be maintained by the court clerk).

[56] *See Bellotti*, 443 U.S. at 645.

[57] 18 PA. CONS. STAT. ANN. § 3206(f)(1) (West 2000).

hear or decide petitions within forty-eight hours;[58] seventy-two hours;[59] or four,[60] five,[61] or seven business days from the date of filing.[62] Some statutes impose a deadline of twenty-four hours for a judge's ruling.[63] Other laws do not set a deadline for hearing petitions, but require courts to give priority to bypass petitions,[64] or oblige the state's court administrative body to establish procedures to expedite bypass petitions and appeals.[65]

A guarantee of "efficiency" is the third requirement of *Bellotti*, and it is perhaps the most difficult requirement to describe.[66] Arguably, safeguards of minors' procedural rights reflect an intent to create a fair alternative to parental involvement. One-third of statutes direct a court official, counselor, attorney, or *guardian ad litem* (GAL) to assist minors in understanding parental involvement laws and the bypass.[67] Moreover, statutes in several states oblige courts or court administrative agencies to create model petitions, court forms, and other sources of information to help minors.[68] Non-

---

[58] *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2152(E) (2009 & Supp. 2009); FLA. STAT. ANN. § 390.01114(4)(b) (West 2007); IDAHO CODE ANN. §18-609A(5) (2004 & Supp. 2009); IND. CODE. ANN. § 16-34-2-4(d) (LexisNexis 1993); IOWA CODE ANN. § 135L.3(l) (West 2007); KAN. STAT. ANN. § 65-6705 (2002); N.D. CENT. CODE § 14-02.1-03.1(2) (2009); TENN. CODE ANN. § 37-10-304(d) (2005); TEX. FAM. CODE ANN. § 33.003(h) (Vernon 2008) (considering petition granted if court has not ruled by 5:00 p.m. on the second business day).

[59] *See, e.g.*, ALA. CODE § 26-21-4(e) (2009); GA. CODE ANN. § 15-11-113 (2008); MICH. COMP. LAWS SERV. § 722.904(g) (LexisNexis 2005); MISS. CODE ANN. § 41-41-55(3) (2009); 18 PA. CONS. STAT. ANN. § 3206(f)(1) (West 2000); S.C. CODE ANN. § 44-41-32(5) (2002); WIS. STAT. § 48.375(7)(d) (2007–08).

[60] *See, e.g.*, COLO. REV. STAT. ANN. § 12-37.5-107(c)(2) (2010); LA. REV. STAT. ANN. § 40:1299.35.5(3)(a) (2008); VA. CODE ANN. § 16.1-241(V) (2010).

[61] *See, e.g.*, DEL. CODE ANN. tit. 24, § 1784(c) (1997); MO. REV. STAT. § 188.028(2)(2) (West 2004); OHIO REV. CODE ANN. § 2151.85(B)(1) (LexisNexis 2007); WYO. STAT. ANN. § 35-6-118(b)(iv) (2009).

[62] *See, e.g.*, NEB. REV. STAT. § 71-6903(7) (2009).

[63] *See*, *e.g.*, W. VA. CODE ANN. § 16-2F-4(e) (LexisNexis 2006) (requiring ruling no later than the day after hearing).

[64] *See, e.g.*, ARK. CODE ANN. § 20-16-804(4) (2009); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 2002); MINN. STAT. § 144.343(c)(iii) (West 2005); OKLA. STAT. ANN. tit. 63, § 1-740.3(D) (West 2010); R.I. GEN. LAWS § 23-4.7-6 (2009); S.D. CODIFIED LAWS § 34-23A-7.1 (2004 & Supp. 2009).

[65] *See, e.g.*, UTAH CODE ANN. § 76-7-304.5(6)(d) (2008); *see also* BYPASSING JUSTICE, *supra* note 9, at 12.

[66] *See* Bellotti v. Baird, 443 U.S. 622, 644 (1979).

[67] *See, e.g.*, ALA. CODE § 26-21-4(b) (2009); GA. CODE ANN. § 15-11-114(a) (2008); IOWA CODE ANN. § 135L.3(3)(b)(West 2007); LA. REV. STAT. ANN. § 40:1299.35.5(B)(2) (2008); MICH. COMP. LAWS SERV. § 722.904(a)(ii–iii) (LexisNexis 2005); MO. ANN. STAT. § 188.028(2)(1) (West 2004); NEB. REV. STAT. § 71-6903(6) (2009); N.C. GEN. STAT. ANN. § 90-21.8(b) (2009); OHIO REV. CODE ANN. §§ 2151.85(B)(2), 2919.121(C)(1) (LexisNexis 2010), 18 PA. CONS. STAT. ANN. § 3206(e) (West 2000); TENN. CODE ANN. § 37-10-304(c)(1–2) (2005).

[68] *See, e.g.*, LA. REV. STAT. ANN. § 40:1299.35.5(B)(2) (2008) (requiring the court to assist minors in filling out petitions and to create forms with "clear and concise language which shall provide step-by-step instructions" for completion and filing).

judicial bodies, such as state or local agencies responsible for children's services and welfare, occasionally have a duty to assist minors as well.[69]

In addition to assistance with understanding the procedural requirements associated with consent or notice laws, many statutes give minors the right to an attorney.[70] About the same number of statutes require courts to appoint a lawyer upon the petitioner's request.[71] A few laws give courts discretion to appoint counsel at the minor's request.[72] Some statutes permit a court to appoint a GAL in addition to appointing a lawyer,[73] and others require a GAL, who in many instances acts as, or in addition to, the minor's

---

[69] *See, e.g.*, TENN. CODE ANN. § 37-10-304(c)(2) (2005) (requiring department of children's services to provide "a written brochure or information sheet that summarizes the provisions and applications of [the statute] and that contains the toll-free telephone number as well as the names, addresses, and telephone numbers of the court advocates in each judicial district.").

[70] *See, e.g.*, ALA. CODE § 26-2-4(b) (2009); ARIZ. REV. STAT. ANN. § 36-2152(C) (2009 & Supp. 2009); GA. CODE ANN. § 15-11-114(a) (2008); IDAHO CODE ANN. §18-609A(3) (2004 & Supp. 2009); IND. CODE ANN. § 16-34-2-4(e) (LexisNexis 1993); KAN. STAT. ANN. § 65-6705(b) (2002); MICH. COMP. LAWS SERV. § 722.904(a)(ii) (LexisNexis 2005); MISS. CODE ANN. § 41-41-55(2) (2009); MO. ANN. STAT. § 188.028(2)(1) (West 2004); OHIO REV. CODE ANN. §§ 2151.85(B)(2), 2919.121(C)(1) (LexisNexis 2010); 18 PA. CONS. STAT. § 3206(e) (West 2000); TEX. FAM. CODE ANN. § 33.003(e) (2008); W. VA. CODE § 16-2F-4(d) (LexisNexis 2006). In addition to access to a court-appointed lawyer or guardian ad litem (GAL), several states make explicit provisions for the waiver of court fees for the minor. *See, e.g.*, ALA. CODE § 26-21-4(b) (2009) (attorney fees paid for if "she is unable to pay for the services of an attorney"); IOWA CODE ANN. § 135L.3(3)(b) (West 2007) (court filing and attorney at no cost for attorney); KAN. STAT. ANN. § 65-6705(b) (2002) (court filing and attorney at no cost); MICH. COMP. LAWS SERV. § 722.904(Sec. 4)(2)(e–f) (LexisNexis 2005) (fees at no cost); NEB. REV. STAT. § 71-6905 (2009) (court filing at no cost); N.C. GEN. STAT. ANN. § 90-21.8(c) (2009) (court filing and attorney at no cost); S.C. CODE ANN. § 44-41-34 (2002); TENN. CODE ANN. § 37-10-304(c)(1) (2005) (court filing and attorney at no cost).

[71] *See, e.g.*, ARK. CODE ANN. § 20-16-804(2)(A) (2009); FLA. STAT. ANN. § 390.01114(4)(a) (West 2007); KY. REV. STAT. ANN. § 311.732(3)(c) (LexisNexis 2009); MINN. STAT. ANN. § 144.343(Subd. 6)(c)(ii)(West 2005); NEB. REV. STAT. § 71-6903(6) (2009); N.C. GEN. STAT. ANN. § 90-21.8(c) (2009); OKLA. STAT. ANN. tit. 63, § 1-740.3(C) (West 2010); S.C. CODE ANN. § 44-41-32(3) (2002); S.D. CODIFIED LAWS § 34-23A-7.1 (2004 & Supp. 2009); TENN. CODE ANN. § 37-10-304(c)(1)(2005); VA. CODE ANN. § 16.1-241(V) (2010).

[72] *See, e.g.*, COLO. REV. STAT. ANN. § 12-37.5-107(2)(b) (2010); WYO. STAT. ANN. § 35-6-118(b)(iii) (2009); UTAH R. JUV. P. RULE 60(c).

[73] *See, e.g.*, COLO. REV. STAT. ANN. § 12-37.5-107(2)(b) (2010); IDAHO CODE ANN. § 18-609A(3) (2004 & Supp. 2009); IOWA CODE ANN. § 135L.3(3)(b) (West 2007); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 2002); MINN. STAT. ANN. § 144.343(Subd. 6)(c)(ii) (West 2005); NEB. REV. STAT. § 71-6903(6) (2009); OKLA. STAT. ANN. tit. 63, § 1-740.3(C) (West 2010); 18 PA. CONS. STAT. ANN. § 3206(e) (West 2000); S.D. CODIFIED LAWS § 34-23A-7.1 (2004 & Supp. 2009); VA. CODE ANN. § 16.1-241(V) (2010).

lawyer.[74] Rhode Island requires the appointment of a GAL with no mention of a lawyer.[75]

C. Standards for Maturity or Best Interests

State parental involvement laws require the same grounds for granting a bypass petition as established by *Bellotti*.[76] A court must find the minor is mature (and, as stated in most laws, well-informed) *or* that an abortion would be in her best interests.[77] Parental involvement laws require courts to grant petitions if a minor proves either one of these grounds, and, in a number of states, a petition is deemed granted if the court issues no decision within a certain timeframe.[78] Some statutes set out three grounds for granting a petition: the minor is mature and well-informed, *or* parental notification would not be in her best interests, *or* "whether notification may lead to mental, physical, sexual, or emotional abuse of the minor."[79]

Maturity and best interests standards are normally not elaborated with specificity, thus giving courts ample discretion.[80] Most states require that the court find the minor to be "mature and well-informed,"[81] or "mature and capable of giving informed consent."[82] Several states qualify the definition

---

[74] *See, e.g.*, KY. REV. STAT. ANN. § 311.732(3)(c) (LexisNexis 2007); MICH. COMP. LAWS SERV. § 722.904(Sec.4)(2)(e) (LexisNexis 2005) (*see* MICH. CT. R. 3.615(F)–(G), requiring appointment of an attorney or GAL at minor's request); MO. ANN. STAT. § 188.028(2)(1) (West 2004); OHIO REV. CODE ANN. § 2151.85(B)(2) (LexisNexis 2007); OHIO REV. CODE ANN. § 2919.121(C)(1) (LexisNexis 2010); S.C. CODE ANN. § 44-41-32 (3) (2002); TEX. FAM. CODE ANN. § 33.003(e) (Vernon 2008).

[75] R.I. GEN. LAWS § 23-4.7-6 (2009).

[76] BYPASSING JUSTICE, *supra* note 9, at 13; *see* Bellotti v. Baird, 443 U.S. 622, 651 (1979).

[77] *See* BYPASSING JUSTICE, *supra* note 9, at 13; *supra* note 21 (noting physician bypass in Maryland, West Virginia, and Maine are exceptions to the use of a court hearing as the alternative to parental involvement).

[78] *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2152(E) (2009 & Supp. 2009); COLO. REV. STAT. ANN. § 12-37.5-107(f) (2010); DEL. CODE ANN. tit. 24, § 1784(c) (1997); GA. CODE ANN. § 15-11-114(d) (2008); IOWA CODE ANN. § 135L.3(l) (West 2007); KAN. STAT. ANN. § 65-6705(f) (2002); MISS. CODE ANN. § 41-41-55(3) (2009); OHIO REV. CODE ANN. § 2151.85(B)(1) (LexisNexis 2007); TEX. FAM. CODE ANN. § 33.003(h) (Vernon 2008); VA. CODE ANN. § 16.1-241(V) (2010).

[79] *E.g.*, TEX. FAM. CODE ANN. § 33.003 (2008 & Vernon Supp. 2009).

[80] *See* BYPASSING JUSTICE, *supra* note 9, at 19–22 (summarizing state appellate courts' varying interpretations of maturity and best interests).

[81] *See, e.g.*, DEL. CODE ANN. tit. 24, § 1784(b) (2008); GA. CODE ANN. § 15-1-114(c)(1) (2008); KAN. STAT. ANN. § 65-6705(d)(1) (2002); KY. REV. STAT. ANN. § 311.732(4)(a) (LexisNexis 2007); N.C. GEN. STAT. ANN. § 90-21.8(e)(1) (2009); S.C. CODE ANN. § 44-41-33(A)(1) (2002); TENN. CODE ANN. § 37-10-304(e)(1) (2005); VA. CODE ANN. § 16.1-241(V) (2010); WIS. STAT. § 48.375(b) (2007–08).

[82] *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2152(B) (2009); ARK. CODE ANN. § 20-16-804(1)(A)(2009); IDAHO CODE ANN. §18-609A(2)(a) (2004 & Supp. 2009); IOWA CODE ANN. § 135L.3(e)(1) (West 2007); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 2002); MINN. STAT. ANN. § 144.343(Subd. 6)(c)(i) (West 2005); NEB. REV. STAT. § 71-6903(1) (2009); OKLA. STAT. ANN. tit. 63, § 1-740.3(A) (West 2010); 18 PA. CONS. STAT. ANN. § 3206(c) (West 2000); R.I. GEN. LAWS § 23-4.7-6 (2009); S.D. CODIFIED LAWS § 34-23A-7(3) (2004 & Supp. 2009); UTAH CODE ANN. § 76-7-304.5(5)(b)(i)(A–B) (2008);

of maturity by stating that the minor must be "sufficiently" mature and well-informed,[83] and at least ten states require that the court find such maturity by clear and convincing evidence.[84]

Statutes' description of the best interests standard varies even less than the language about maturity.[85] Some laws include abuse or assault as a ground for granting a bypass petition or in defining situations where abortion might be in the minor's best interests.[86] Where abuse is a ground for granting a petition, statutes differ in what evidence they require to help substantiate that abuse occurred.[87]

Few laws describe how a minor, her attorney, or the court should prove the minor's maturity or best interests. In several states, statutes require courts to hear evidence "relating to the emotional development, maturity, intellect, and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful."[88] Some statutes also require the minor to show—either in her petition or at the hearing—that she "has been fully informed of the risks and consequences of the abortion; that she is of sound mind and has sufficient intellectual capacity to consent to the abortion."[89] A handful of states re-

---

see also North Dakota's consent statute, which empowers the court to "[i]ssue an order to provide the minor with any necessary information to assist her in her decision if the minor is mature enough to make the decision but not well informed enough to do so." N.D. CENT. CODE § 14-02.1-03.1(5)(b)(1) (2009).

[83] *See, e.g.*, ALA. CODE § 26-21-4 (4)(a) (2009); COLO. REV. STAT. ANN. § 12-37.5-107(2)(a) (2010); FLA. STAT. ANN. § 390.01114(4)(c) (West 2007); LA. REV. STAT. ANN. § 40:1299.35.5(B)(3)(b)(ii) (2008); MICH. COMP. LAWS SERV. § 722.904(3)(a) (LexisNexis 2005); N.D. CENT. CODE § 14-02.1-03.1(2)(a) (2009); OHIO REV. CODE ANN. § 2919.121(3) (LexisNexis 2010); TEX. FAM. CODE ANN. § 33.003(i) (Vernon 2008); WYO. STAT. ANN. § 35-6-118(b)(V)(B) (2009).

[84] *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2152(C) (2009); COLO. REV. STAT. ANN. § 12-37.5-107(2)(a) (2010); FLA. STAT. ANN. § 390.01114(4)(c) (West 2007); IDAHO CODE ANN. § 18-609A(2)(a) (2004 & Supp. 2009); LA. REV. STAT. ANN. § 40:1299.35.5(B)(4) (2008); MISS. CODE ANN. § 41-41-55(4)(a) (2009); OHIO REV. CODE ANN. § 2151.85(C)(1) (LexisNexis 2007); OKLA. STAT. ANN. tit. 63, § 1-740.3(A) (West 2010); S.D. CODIFIED LAWS § 34-23A-7(3) (2004 & Supp. 2009); WYO. STAT. ANN. § 35-6-118(b)(v)(B) (2009). The clear and convincing evidence standard has been the subject of recent legislative attention. *See infra* note 181, 213 (describing bills introduced to change the standard of maturity).

[85] BYPASSING JUSTICE, *supra* note 9, at 14.

[86] *See, e.g.*, ALA. CODE § 26-21-4(d)(4)(b) (2009); FLA. STAT. ANN. § 390.01114 (4)(d) (West 2007); N.C. GEN. STAT. ANN. § 90-21.8(e)(3) (2009); OHIO REV. CODE ANN. § 2151.85(C)(2) (LexisNexis 2010); TEX. FAM. CODE ANN. § 33.003(i) (Vernon 2008).

[87] BYPASSING JUSTICE, *supra* note 9, at 16. For example, in Oklahoma, a minor's physician must report the abuse or assault to local law enforcement or the Department of Human Services *before* a bypass hearing. OKLA. STAT. ANN. tit. 63, § 1-740.2(C)(2) (West 2010).

[88] *E.g.*, MO. ANN. STAT. § 188.028(2)(1) (West 2004); N.C. GEN. STAT. ANN. § 90-21.8(d) (2009); OHIO REV. CODE ANN. § 2919.121(C)(2) (LexisNexis 2010). *See also* 18 PA. CONS. STAT. ANN. § 3206(f)(4) (West 2000); S.C. CODE ANN. § 44-41-32(5) (2002); WIS. STAT. § 48.375(7)(b)(1) (2007-08).

[89] *E.g.*, MO. ANN. STAT. § 188.028(2)(1) (West 2004); *see also* OHIO REV. CODE ANN. § 2919.121(c)(1) (LexisNexis 2010); 18 PA. CONS. STAT. ANN. § 3206(f)(2)(iv–v) (West 2000); WIS. STAT. § 48.257(e) (2007–08); WYO. STAT. ANN. § 35-6-18(b)(v)(B) (2009).

quire minors seeking a bypass to undergo counseling or receive state materials on abortion (and other subjects) before the court will hear their petitions.[90]

In sum, the text of parental involvement statutes might give the impression of a good-faith effort to balance the interests of minors, their parents, and the state in abortion decisions. The laws outline an alternative to parental consultation, allow providers to use reasonable means to establish notice or consent, and give minors rights to information and assistance. Moreover, the amount of discretion statutes confer upon judges or physicians might lead one to believe that there is room to interpret statutes in ways that can ensure a fair process for young women. As Part II explains, however, on-the-ground experience with parental involvement laws reveals that, as applied, notice and consent requirements often present impassable barriers to abortion services for many pregnant minors.

II. The Gap Between Law and Practice: Parental Involvement Laws Applied

In most states, the application of parental involvement laws is anything but effective, confidential, or timely. Unlike many other research studies in the area, the National Partnership's project compared what law purports to do (through an examination of statutes, regulations, case law, statistics, court forms) and what the law accomplishes in practice (as evidenced by 155 interviews conducted).[91] The study represents the views of professionals from every state with a judicial bypass, including interviews with eighteen judges, thirty-two lawyers, and fifty-four clinic staff members.[92] In addition, the Partnership convened several meetings: a meeting that brought together fifty judges, advocates, lawyers, and clinicians to share information on how the bypass functions in various states; a meeting of providers and clinic directors to reflect on liability issues; and a meeting of judges from across the country

---

[90] *See, e.g.*, Iowa Code Ann. § 135L.2 (West 2007) (establishing a program that includes decision-making video and workbook); Kan. Stat. Ann. § 65-6704 (2002); La. Rev. Stat. Ann. § 40:1299.35.5(B)(3)(b)(i) (2008 & Supp. 2010) (requiring minors to "participate in an evaluation and counseling session with a mental health professional from the Department of Health and Hospitals, office of mental health, or a staff member from the Department of Social Services, office of community services, or both").

[91] *But see* J. Shoshanna Ehrlich, Who Decides? The Abortion Rights of Teens (2006) [hereinafter Who Decides] (interviewing minors about their experiences seeking a judicial bypass); Helena Silverstein, Girls on the Stand: How Courts Fail Pregnant Minors (2007) (interviewing clerks and intake staff members at courts in Alabama, Pennsylvania, and Tennessee).

[92] Each conversation was similarly structured by a series of questions that addressed topics such as the operation of notice or consent standards, the availability and process associated with the judicial bypass, and characteristics and experiences of minors seeking abortions. The study is by no means an exhaustive or comprehensive statement of the diverse views of professionals working across the country. It is a snapshot of the operation of parental involvement laws in varying contexts. Bypassing Justice, *supra* note 9, at 23, 29, 34.

to discuss judicial training.[93] Finally, project staff telephoned sixty courts in three states, inquiring about bypass hearings to test the availability and accuracy of information.[94] The study uncovered obstacles to legal and clinical services that make abortion access for minors, especially through a judicial bypass, daunting if not impossible.

A. Availability of Reliable Information

A major problem with the operation of parental involvement laws is the lack of information available to minors, their advocates, and state and local officials.[95] Each person interviewed named her central concern about parental involvement laws, and the most common response was that minors do not know that these laws exist.[96] If minors are aware of the state's law, they may not understand how to comply with consent or notice standards or how to petition for a bypass.[97] Even if a minor learns of her options from a hotline, website, clinic receptionist, or school nurse, the coordination between courts, clinics, and law offices is often inconsistent and unreliable.[98]

There are various reasons for this information deficit, several of which Part III explores further. Pro-choice advocates or providers who would disseminate information about consent or notice laws fear backlash from the public or public officials who view the judicial bypass as a means of permitting abortions through legal "loopholes."[99] Too much publicity, reproductive rights advocates argue, will put minors' abortions on the radar of state legislatures, which might restrict access to abortion further.[100] It is for this reason that some lawyers do not claim their fees from the state, and clerks do not include the expense associated with bypass hearings in court budgets.[101] Increased attention to consent or notice laws can backfire for clinics as well,

---

[93] BYPASSING JUSTICE, *supra* note 9, at 8–9.

[94] *Id.* at 9, 44. The template for National Partnership's calls was Helena Silverstein's book, *Girls on the Stand: How Courts Fail Pregnant Minors*. SILVERSTEIN, *supra* note 91, at 39–41.

[95] BYPASSING JUSTICE, *supra* note 9, at 49–50.

[96] *Id.* at 49.

[97] Another finding of the project was how little information and access to reproductive health care (or any health care) most minors have generally. A clinician that saw minors living in non-urban areas of the state described the health care that minors typically receive in one particular state—*prior* to seeking an abortion—as "third-world care." *Id.* at 39; *see also* Lisa R. Pruitt, *Toward a Feminist Theory of the Rural*, 2007 UTAH L. REV. 421, 478–483 (2007) (describing the challenges of seeking a bypass or abortion services for rural youth).

[98] *See* BYPASSING JUSTICE, *supra* note 9, at 50.

[99] *See id.* at 46 (quoting the comment of one interviewee, it is " 'hard to get information about the bypass to minors in a politically acceptable way.' "); *see also* Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 443 (2009) (noting also that, in general, abortion is a procedure that most women have discreetly).

[100] BYPASSING JUSTICE, *supra* note 9, at 47.

[101] *Id.* at 30, 47.

which are frequently the targets of litigation.[102] Clinic staff members and directors interviewed stated that liability concerns "greatly influence their policies and practices."[103]

When minors learn that the bypass exists, they will often receive insufficient or inaccurate information from clinic receptionists, court employees, school counselors, or other "first contacts."[104] The role of court clerks, for example, varies from jurisdiction to jurisdiction. In some locales, clerks go to great lengths to help explain and facilitate the bypass process for minors.[105] In many other jurisdictions, clerks are of little assistance.[106] Calls to over sixty courthouses in three states (diverse in their region, population size, and political culture) revealed that in two of the three states, almost no one answering the courts' telephones could give accurate information about the bypass.[107] In addition, the study found that a few clinic receptionists will describe parental notice or consent, but will not initially explain that the bypass is an option to minors who call with questions about abortion services.[108]

Like minors, legal or clinical professionals may not have ready access to information about parental involvement laws.[109] Few judges, clerks, clinics, and lawyers receive any training on how the bypass process should work or what protections the law provides.[110] Although bench books sometimes include materials on conducting bypass hearings, judges often receive no additional training.[111] Moreover, it is unclear how effective or willing state-funded local or community health clinic employees, who counsel pregnant minors in the course of their jobs, are at helping young women understand parental involvement requirements.[112] In one state, for example, a family-planning counselor assigned to advise pregnant minors in a state health clinic did not know that the bypass existed.[113]

Other legal or clinical actors are willfully ignorant of their legal obligations or refuse to assist minors regardless of what the state statute requires.[114] Despite a duty to hear all bypass petitions within five days of filing, one court would only hear petitions two days a month until lawyers objected and

---

[102] *See id.* at 36.

[103] *Id.*; *cf.* Roe v. Planned Parenthood of Sw. Ohio Region, 878 N.E.2d 1061, 1069 (Ohio Ct. App. 2007) (holding that parents could not compel discovery of clinics' records of minor-patients after petitioner's daughter secured an abortion through a twenty-one-year-old boyfriend who posed as a parent).

[104] BYPASSING JUSTICE, *supra* note 9, at 49.

[105] *Id.* at 43.

[106] *Id.*

[107] *Id.* at 44.

[108] *Id.* at 38.

[109] *See id.* at 54 ("At the state level, what is usually missing is a central source of information about how to get a bypass and where it can or cannot be obtained.").

[110] *See id.* at 24, 33, 42.

[111] *Id.* at 24.

[112] *Id.* at 48.

[113] *Id.*

[114] *Id.*

more hearings were scheduled.[115] A court in another county was "too busy" to accept any bypass petitions.[116] Likewise, although a rare occurrence, a few clinicians interviewed reported that they vet which minors have a "good enough" reason for not telling their parents about their pregnancies.[117] By determining who is a "deserving" minor, these clinic staff members substitute their judgment about maturity or best interests for the court's and potentially deprive minors of an alternative to which they are legally entitled.

B. Obstacles of Cost and Travel

There are varied logistical impediments to complying with parental involvement laws or petitioning a court for a bypass. Interviewees reported that obstacles of cost and travel make a bypass feel "impossible" and "insurmountable."[118] The cost of an abortion can be expensive for women of any age but may be especially prohibitive for younger adolescents who seldom earn their own income or, in fear of revealing their pregnancy, will not avail of their parent's health care coverage.[119]

Other burdens relate to the differences between urban and rural access to abortion and legal services. Most abortion providers are located in cities or suburban areas,[120] and they refer minors to nearby courts (which typically have the capacity and will to hear bypass petitions).[121] As a result, rural minors travel long distances to reach clinical and court services. A trip (or trips) of any significant length can be extremely daunting for a young woman who may not have a driver's license, access to a car, or money for travel and related costs. If travelling from out of state, there is often no way to follow up with minor-patients about using family planning methods or treating and preventing sexually transmitted infections (STIs).[122] In addition, a minor seeking a bypass might take several unexcused school absences, which can ultimately lead to expulsion or truancy charges.[123] Minors who are not fluent in English face a different set of hurdles. Courts may not have

---

[115] *Id.* at 50.
[116] *Id.*
[117] *Id.* at 38.
[118] *Id.* at 50.
[119] *See* Abigail English & Carol A. Ford, *The HIPAA Privacy Rule and Adolescents: Legal Questions and Clinical Challenges*, 36 PERSP. SEXUAL & REPROD. HEALTH 80, 84 (2004) (stating in regard to confidential health care services, "if the minor has health insurance coverage and wishes to use it to pay for the care, additional risks exist that disclosure will take place through the insurance claims process, when explanations of benefits are sent to the policyholder, usually a parent"); Rachel K. Jones et al., *Abortion in the United States: Incidence and Access to Services, 2005*, 40 PERSP. SEXUAL & REPROD. HEALTH 6, 15 (2008) (estimating the average amount a woman paid for an abortion at ten weeks was $413 in 2006).
[120] Jones et al., *supra* note 119, at 14.
[121] BYPASSING JUSTICE, *supra* note 9, at 50.
[122] *Id.* at 39.
[123] *Id.* at 51.

interpreters on hand to accommodate a non-English bypass hearing or materials on the state parental-involvement law may only be in English.[124]

C. Dignity and Delay

Logistical obstacles can create delay, and delay can exacerbate fiscal and emotional costs. Sometimes delay is imposed directly by judges, who refuse to hear petitions.[125] Some judges will not participate in the bypass because of religious objections to abortion or for fear of jeopardizing their re-election prospects.[126] One attorney described recusals in her courthouse as "a hot-potato situation," noting that as many as five judges will recuse themselves before one agrees to hear the petition.[127] Lawyers can also be in short supply. Many statutes give minors the right to a lawyer at no cost.[128] However, minors would be hard-pressed to realize this right in many places.[129] Lawyers must often take time from busy private or public interest practices to represent minors whose petitions need immediate attention.[130] One interviewee noted, "[s]ometimes we struggle to find an attorney who will call the minor back right away."[131] Moreover, bypass hearings require a level of specialization. Not only does a lawyer need to interview the minor to establish her maturity or best interests, she needs to understand what questions local judges will want answered.[132]

Even when bypass petitions succeed, the current system of parental involvement laws can impose intangible burdens, what Carol Sanger describes as harm to a minor's "decisional dignity."[133] In the course of bypass hearings, minors must reveal the intimacies of their sexual lives before strangers

---

[124] *Id.*

[125] *Id.* at 24. *But see* Joyce, *supra* note 11, at 172 (finding that minors who obtained a judicial bypass terminated the pregnancy earlier, on average, than minors who obtain parental consent).

[126] *See* Caroline A. Placey, Comment, *Of Judicial Bypass Procedures, Moral Recusal, and Protected Political Speech: Throwing Pregnant Minors Under the Campaign Bus*, 56 EMORY L.J. 693, 695, 719–20, 727–28 (2006). Of course, recusals can be a good thing. Many lawyers interviewed did not want judges "forced" to hear petitions if they had moral objections or political qualms. *See* BYPASSING JUSTICE, *supra* note 9, at 24.

[127] BYPASSING JUSTICE, *supra* note 9, at 24.

[128] *See supra* Part I(B).

[129] BYPASSING JUSTICE, *supra* note 9, at 53; *see also* Elizabeth Susan Graybill, Note, *Assisting Minors Seeking Abortions in Judicial Bypass Proceedings: A Guardian ad Litem Is No Substitute for an Attorney*, 55 VAND. L. REV. 581, 585 (2002) (arguing that "the appointment of counsel for minors in civil proceedings is necessary to ensure effective legal representation and adequate protection of a minor's interests.").

[130] BYPASSING JUSTICE, *supra* note 9, at 30.

[131] *Id.* at 33.

[132] *See id.* at 30–31.

[133] Sanger, *supra* note 99, at 417. *See generally* Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589, 625 (2001–2002) (describing *Bellotti* as purporting to grant rights to minors but only shifting authority from parents to courts).

and answer questions about their future plans and family relationships. Relating these details at hearings in a scripted narrative about harm and remorse can damage petitioners' sense of self-respect and the legitimacy of the legal system as a whole.[134]

Interviewees described the emotional distress that a bypass hearing can cause, even when the petition is granted and when the judge, clerks, and others are not overtly hostile to the minor.[135] When judges or others are antagonistic, the process can cause overwhelming anxiety.[136] Several interviewees noted occasions where clerks or judges exhibited "blistering verbal hostility" toward minors petitioning the court.[137] Minors were described as scared, upset, and embarrassed in hearings that were marked with "secrecy and shame," trauma, humiliation—"a nightmare."[138]

D. Extra-Legal Requirements

Despite laws requiring certain courts to accept bypass petitions, in very few states can minors file a petition in the relevant court of any county or district.[139] Some courts reject petitions by non-resident minors even though the state statute clearly allows non-residents to petition for a bypass order.[140] In two states, the study found, it is unlikely that any court will currently hear petitions.[141]

Parental involvement laws also require judges to make independent evaluations of best interests and maturity, such that if a minor does not meet one standard, she may meet the other.[142] However, some judges conflate maturity and best interests or will only consider one of the two standards.[143] A few judges abuse their discretion by asking inappropriate questions or making inappropriate demands, practices that have been the subject of national attention.[144] For example, judges have asked petitioners about their

---

[134] Sanger, *supra* note 99, at 419–20, 444–45, 466.

[135] BYPASSING JUSTICE, *supra* note 9, at 27.

[136] *See* J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision without Involving Their Parents*, 18 BERKELEY WOMEN'S L.J. 61, 173–74 (2003) [hereinafter *Grounded in the Reality*].

[137] BYPASSING JUSTICE, *supra* note 9, at 26.

[138] *Id.* at 27.

[139] *Id.* at 53.

[140] *Id.* at 26.

[141] *Id.* at 53.

[142] *See supra* Part I(C).

[143] BYPASSING JUSTICE, *supra* note 9, at 29.

[144] *See* Khiara M. Bridges, *An Anthropological Meditation on* Ex Parte Anonymous*—A Judicial Bypass Procedure for an Adolescent's Abortion*, 94 CAL. L. REV. 215, 225–26 (2006) (noting "subtle corruption of the minor's testimony in the face of the questions of the court"); Jamin B. Raskin, *The Paradox of Judicial Bypass Proceedings*, 10 AM. U. J. GENDER SOC. POL'Y & L. 281, 284 (2002) ("question[s] of [the petitioner's] relationship to the father of the potential child, whether she has a boyfriend, how she gets along with her parents, what her social life is like, what her favorite classes are, whether she has ever used drugs or alcohol, and so on simply have nothing to do with the only legitimate inquiry, which is: what are the relative medical risks attendant to both the

sexual habits or relationships in a manner that did not support a maturity or best interests inquiry.[145]

Some abortion care providers also require more of minors than the law does, potentially eviscerating the difference between notice and consent in practice.[146] A number of clinics in notice states reported that they ask all parents to sign certain forms (sometimes in-person) even though the state statute only requires the provider to mail a letter of notice to a parent.[147] In one instance, a clinic required a parent to accompany the minor for the duration of her appointment because she resided in a neighboring state.[148]

E. Marginalized Populations: Minors in State or Foster Care

One of the most striking examples of the gap between law and practice is the predicament of minors whose parents are missing or unavailable. As noted, most laws do not anticipate this situation.[149] Parents may know about their daughter's pregnancy, but often may be unable or unwilling to take the steps necessary to notarize consent forms, to appear in person to sign provider documents, or to accompany minors to their appointments.[150] Parents' failures to comply with provider policies might be based in opposition to abortion, but it may also relate to a parent's work schedule, immigration status, or temporary absence due to travel or incarceration. Immigrant-parents, for example, may lack the necessary identification (driver licenses or birth certificates) to establish parentage.[151] Parental involvement laws thus penalize adolescents who would consult their parents,[152] but whose parents

---

abortion procedure and pregnancy and childbirth."); Helena Silverstein & Kathryn Lundwall Alessi, *Religious Establishment in Hearings to Waive Parental Consent for Abortion*, 7 U. PA. J. CONST. L. 473, 491 n.120 (2004) (describing how judges in Alabama require minors to attend counseling sessions at "Sav-A-Life" centers where staff advise minors to carry their pregnancies to term and practice Christian beliefs).

[145] BYPASSING JUSTICE, *supra* note 9, at 25–26.

[146] *Id.* at 35, 37.

[147] *Id.* at 37.

[148] *Id.* The precautions that clinics take to protect themselves from liability are understandable given the penalties under parental involvement laws. Many laws allow a provider to rely on a good faith defense in answering the allegation that she failed to use reasonable means to establish notice or consent. That said, defending any litigation, no matter the ultimate outcome, is costly and damages the provider's public image. *See, e.g.*, GA. CODE ANN. § 15-11-117 (2008) ("Immunity of health care provider acting in good faith"); *see also* Pammela S. Quinn, Note, *Preserving Minors' Rights After* Casey*: The "New Battlefield" of Negligence and Strict Liability Statutes*, 49 DUKE L.J. 297, 312–13, 320–21 (1999–2000) (noting court decisions striking down strict liability standards as unconstitutional, and detailing the liability threats to abortion providers and the resulting chilling effect on their practices).

[149] *See supra* Part I(B).

[150] BYPASSING JUSTICE, *supra* note 9, at 37.

[151] *Id.*

[152] As has been well documented, the large majority of minors choose to involve their parents. *See* Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSP. 196, 200 (1992); Laurie S. Zabin et al., *To Whom Do Inner-City Minors Talk about Their Pregnancies? Adolescents' Communica-*

cannot or will not comply with the requirements established under notice or consent statutes. To access legal abortion, minors with unavailable parents must petition a court for a bypass, which, as explained, poses its own set of challenges.[153]

Minors who are in state care, who have non-existent or strained relationships with their parents, acutely feel the weight of consent or notice laws. More than half a million children in the United States live in foster care and thirty percent of those are teenagers.[154] One study found that nearly one-third of the young women in foster care have been pregnant by the time they are seventeen.[155] According to the same study, by age nineteen, half of the adolescents in or exiting foster care will have been pregnant.[156]

Interviews revealed consistent confusion about the standards governing consent or notice for a minor in state care wanting an abortion.[157] Health care decisions for minors in the foster care system can depend on broad distinctions such as whether the health care service is routine or non-routine.[158] For abortion, state agencies and foster parents are often unwilling to provide consent or accept notice for minors in care, even if they have the authority to do so.[159] Their reasons vary: a state social worker may be biased against abortion or fear a lawsuit brought by parents whose rights have not been terminated.[160] The common rationale offered by interviewees, however, was the concern that state employees, whose agencies receive funding from federal sources, cannot assist minors electing abortion.[161]

---

tion with Parents and Parent Surrogates, 24 FAM. PLAN. PERSP. 148, 148 (1992). Moreover, minors who do not involve parents often seek advice from a trusted adult. Ehrlich, *Grounded in Reality*, *supra* note 136, at 98–100.

[153] *See supra* Part I(B).

[154] LOIS THIESSEN LOVE ET AL., THE NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, PREVENTING TEEN PREGNANCY AMONG YOUTH IN FOSTER CARE 1, 6 (2005), *available at* http://www.thenationalcampaign.org/resources/pdf/pubs/FosteringHope_FINAL.pdf.

[155] *Id.* at 7.

[156] *Id.*

[157] BYPASSING JUSTICE, *supra* note 9, at 48.

[158] *See, e.g.*, 55 PA. CODE § 3130.91(2)(i), (6) (1999) (giving a state agency the ability to authorize "routine" treatment, though requiring a minor seeking an abortion to "comply with applicable law"). Generally, parents or legal guardians have the authority to consent to routine and non-routine medical care for minors, although in defined instances minors can consent to their own medical care. In many states, a minor may consent to her own medical treatment in statutorily enumerated circumstances, such as for contraceptives use, drug and alcohol treatment, treatment for sexually-transmitted infections, and prenatal care. *See* GUTTMACHER INST., STATE POLICIES IN BRIEF, AN OVERVIEW OF MINORS' CONSENT LAWS 1–2 (Nov. 1, 2010) (summarizing state statutes providing "legal ability of minors to consent to a range of sensitive health care services—including sexual and reproductive health care, mental health services, and alcohol and drug abuse treatment"), *available at* http://www.guttmacher.org/statecenter/spibs/spib_OMCL.pdf.

[159] BYPASSING JUSTICE, *supra* note 9, at 51.

[160] *Id.*

[161] *Id.* at 48. Both federal and state restrictions on funding abortions may be the basis for this potentially unfounded belief. Regarding federal policy, the Hyde Amendment (which is an annual rider on the Department of Health and Human Services' budget)

In Alabama, for example, a person or state agency named in a temporary custody order may approve some medical treatments for children in foster or state care.[162] Typically, court custody orders authorize the Department of Human Resources (DHR) to consent to medical care.[163] If the foster child seeks an abortion, DHR will not consent, and department personnel will not assist the foster child in obtaining abortion services without court approval.[164] DHR's policy became clear through a case challenging the state's parental consent law, *In re Anonymous.*[165] The petitioner was in DHR's custody, and neither of her parents was available to consent.[166] DHR argued that it could not give consent because an agency receiving federal funds could not participate in minors' decisions regarding abortion.[167] The Alabama Supreme Court did not clarify the issue, stating that it "express[ed] no opinion regarding the duties of a department of the State of Alabama which has custody of a minor and takes the position that the mere receiving of Federal funds abrogates its otherwise clear statutory and lawful duty of protecting the best interest of the minor."[168]

When a minor in a group or foster home seeks an abortion in a state that requires parental consent, she often has the same two options as a minor who is not in foster care—she must receive permission from a legal guardian or a judge. She probably has a tenuous or distant relationship with her parents, and, if pursuing a bypass, she carries all the same burdens as a minor not in foster care but is less likely to have the same resources.

The National Partnership's study illustrates that many young women have access to their legal rights determined by state systems that lack transparency and reliability. In the face of these obstacles, Part III explores how those opposed to parental involvement laws have pursued reform. These strategies appear to have had limited success in changing laws or shaping the attitudes that support them.

---

prohibits federal spending on abortions services unless the pregnancy is the result of rape or incest, or the pregnant woman's life is in danger. Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976) (first appropriations rider). States may pay for or subsidize abortion services using their own funds. *See, e.g.*, *Public Funding for Abortion*, American Civil Liberties Union, http://www.aclu.org/files/FilesPDFs/map.pdf (map showing which states fund abortion for low-income women voluntarily or because of a court order). However, states have passed laws like the Hyde Amendment that restrict state funding for abortion. For example, Texas law states that money spent under a demonstration project for women's health care services may not be used to perform or promote elective abortions. Tex. Hum. Res. Code Ann. § 32.0248(a)(7) (Vernon 2010).

[162] Ala. Admin. Code r. 660-5-28.07(5) (Supp. 2003).

[163] Alabama Department of Human Resources, The Foster Parent Handbook: A Guide for Alabama's Foster Parents 1, 37 (2001), *available at* http://www.dhr.state.al.us/large_docs/fphandbook.pdf.

[164] Ala. Admin. Code r. 660-5-28.07(5)(c) (Supp. 2003).

[165] *In re* Anonymous, 531 So. 2d 901 (Ala. 1988).

[166] *Id.* at 902.

[167] *Id.* at 902 n.1.

[168] *Id.*

III. Limitations of Traditional Reform Strategies

Attempts to retrench parental involvement laws typically take three forms: challenges to laws' constitutionality, state legislative lobbying on the language of parental involvement statutes, and campaigns to change public attitudes.[169] Part III considers how precedent, the larger abortion debate, and support for parental rights thwart current reform. Moreover, even if one or all of the three strategies described here were to succeed, it might militate against a different perspective on adolescent reproductive autonomy.

A. Litigation

Parental involvement laws have been the subject of extensive litigation,[170] but for the reasons this section explains, new facial or as-applied challenges of consent or notice laws may not be prudent.[171] Although some facial challenges have resulted in injunctions against parental involvement laws in federal and state courts (ground that appears to be well tested),[172] cases decided by the Supreme Court suggest that future litigation faces lim-

---

[169] *See, e.g.*, Who Decides, *supra* note 91, at 160 (recommending policy that enacts "nondirective" counseling programs and allows non-parent adult involvement); Amanda M. Lanham, *Parental Notification under the Undue Burden Standard: Is a Bypass Mechanism Required?*, 37 Rutgers L.J. 551, 582 (2005–06) (arguing for a more rigorous undue burden standard, based on empirical findings about the effect of notice laws); Raskin, *supra* note 144, at 281 (noting that "except for reasons of her health or safety, there will never be a logical point at which you can veto the abortion decision unless you, the judge, happen to be ideologically opposed to abortion and are determined to have your way over her will."); Sanger, *supra* note 99, at 498 (calling for laws that allow non-parent adults to consent to abortion); Silverstein & Alessi, *supra* note 144, at 515–532 (describing potential challenge under the Establishment Clause for courts that refer minors to Christian organizations for counseling, but lamenting that a minor may be wary of challenging an Establishment Clause violation in court); Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 Marquette L. Rev. (forthcoming Jan. 2011) ("litigation [in the abortion context] sometimes offers movements framing opportunities that might not be available through ordinary politics"). *But see* Silverstein, *supra* note 91, at 166–172 (noting that challenging parental involvement laws through appeals of denied petitions has little pragmatic appeal).

[170] This section does not address decisions of state appellate courts reversing or affirming individuals' bypass petitions because it is concerned with systematic reform.

[171] *See* Pine, *supra* note 8, at 698–702 (describing the difference between as applied and facial challenges).

[172] *See supra* note 24 (citing state court decisions enjoining statutes in California, Illinois, Montana, New Jersey, and Nevada). In several states, legislatures have passed new parental involvement laws after courts struck down the state consent law. *See, e.g.*, Fla. Stat. § 390.01114 (West 2007) (effective 2006) (passed after constitutional amendment, section 22, requiring parental notice before abortion); N. Fla. Women's Health & Counseling Servs. v. Florida, 866 So. 2d 612 (Fla. 2003) (striking down Florida's 1999 parental notice statute). And, of course, litigation has not always resulted in injunctions, but in courts upholding the parental involvement statute. *See, e.g.*, Barnes v. Mississippi, 992 F.2d 1335 (5th Cir. 1993), *cert. denied*, 510 U.S. 976 (1993) (reversing district court's granting of an injunction of two-parent consent law); Pro-Choice Miss. v. Fordice, 716 So. 2d 645, 660 (Miss. 1998) (upholding two-parent consent law).

ited prospects of success.[173] Moreover, taking an as-applied challenge to a state's law—arguing that the law in practice is unconstitutional—might produce results that reproductive rights advocates might seek to avoid.[174]

1. *Supreme Court Precedent*

United States Supreme Court decisions suggest an uncertain future for litigation on the judicial bypass at the federal level. In the 1990 case, *Hodgson v. Minnesota*, the Court considered the constitutionality of Minnesota's two-parent notice law.[175] Lawyers in *Hodgson* introduced testimony from judges that the requirements of parental involvement laws were too burdensome on minors, judges were unequipped to gauge maturity or best interests for abortion purposes, and the two-parent requirement exacerbated family strife.[176] This testimony supported the lower court's decision that two-parent notification did not further the State's interests in protecting minors and fostering parent-child communication.[177]

A divided Supreme Court disagreed with the district court. Four justices found the two-parent notification requirement unconstitutional in any circumstance, although for different reasons than the district court, and four justices found the law constitutional with or without a judicial bypass.[178] Justice O'Connor provided the decisive vote, reasoning that Minnesota's law was constitutional so long as a judicial bypass was available.[179] The Court's ruling may have signaled to lawyers that introducing evidence about the bypass's effect on minors would have little sway before the Supreme Court.[180]

Around the same time as *Hodgson,* the Court upheld laws that made a bypass order more difficult for minors to obtain. In *Ohio v. Akron Center for Reproductive Health*, the Court affirmed a notice statute that imposed a heightened burden of proof on the minor.[181] In finding the "clear and con-

---

[173] For a discussion of the Supreme Court's decisions regarding parental involvement laws, *see* NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES 95–100 (2010) [hereinafter RED FAMILIES].

[174] Appeals of individual denials of bypass petitions can be risky, too. Some lawyers reported that they do not appeal denials of bypass petitions, because the minor is either unwilling to participate or the state appellate court routinely rejects appeals. BYPASSING JUSTICE, *supra* note 9, at 19, 32.

[175] Hodgson v. Minnesota, 497 U.S. 417 (1990) [hereinafter *Hodgson III*]. For a summary of facts presented in the *Hodgson* district court, see Pine, *supra* note 8, at 679–80.

[176] *Hodgson I*, 648 F. Supp. 756, 774–75 [hereinafter *Hodgson I*], *rev'd*, 853 F.2d 1452, 1466 (8th Cir. 1988) [hereinafter *Hodgson II*].

[177] *Id.* at 778.

[178] *Hodgson III*, 497 U.S. at 422, 455, 457–58, 461–62, 479–81, 501.

[179] *Id.* at 461.

[180] *See* REPORT ON A MEETING, *supra* note 13, at 17–18.

[181] 497 U.S. 502, 506–07, 517–18 (1990) (holding that bypass procedure requiring the minor to show by "clear and convincing evidence" either that she is sufficiently mature to choose abortion or that an abortion is in her best interests does not violate due process).

vincing evidence" standard constitutional, the Court reasoned that requiring the petitioner to bear the more stringent burden of proof may help ensure that judges take special care in deciding petitions.[182] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the landmark case in which the Court reaffirmed *Roe v. Wade*[183] but narrowed the scope of the right to abortion for all women, upheld the constitutionality of a parental consent law (one of several laws the Court considered).[184]

In each of these cases, the Court repeated the *Bellotti* trope that parental involvement laws improve parent-minor communication and protect minors' health and well-being.[185] Perhaps it is unsurprising that more recent challenges to parental involvement laws attack the constitutionality of discrete provisions, such as statutory exceptions for medical emergency. Although litigation has achieved some success in federal and state courts,[186] it may have limited strategic potential going forward.

In *Planned Parenthood of Northern New England v. Heed*, the Court of Appeals for the First Circuit struck down a New Hampshire notice statute that defined medical emergency without reference to protecting the minor's health.[187] The statute provided for a medical exception to the parental notification requirement only when a physician determined that the abortion was necessary to save the minor's life.[188] The First Circuit also held that the provision requiring physicians to certify that abortion was "necessary to prevent the minor's death"[189] placed physicians in a double bind: they "either . . .

---

[182] *Id.* at 517–18.

[183] 410 U.S. 113 (1973).

[184] 505 U.S. 833, 899–900 (1992); *see also* Linda J. Wharton et al., *Preserving the Core of* Roe: *Reflections on* Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 327 (2006) (showing how *Hodgson* buttressed the Court of Appeals' reasoning in *Casey*).

[185] *Hodgson III*, 497 U.S. 417, 445–47 (1990) (summarizing state interest in protecting parental rights); *Akron*, 497 U.S. at 520 (noting that "the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature"); *Casey,* 505 U.S. at 899 (citing the benefit of "provid[ing] the parent or parents of a pregnant young woman the opportunity to consult with her in private, and to discuss the consequences of her decision" as support for its decision to uphold parental consent procedures). Around the same time as *Akron* and *Casey*, the Supreme Court also heard *Lambert v. Wicklund*, 520 U.S. 292 (1997), which dealt with the meaning of the best interests standard. The Supreme Court upheld a Montana statute requiring minors to prove that avoiding parental notification, rather than having an abortion, was in their best interests. *Id.* at 297–98.

[186] *See, e.g.*, State v. Planned Parenthood of Alaska, 171 P.3d 577, 585 (Alaska 2007) (striking down a parental notification law for overly narrow medical emergency exception in violation of state constitution on the grounds that the act was not the least restrictive means of accomplishing the goal of protecting minors); *see also* Planned Parenthood of Idaho v. Wasden, 376 F.3d 908, 935 (9th Cir. 2004) (striking down a consent law because the definition of medical emergency was unconstitutionally narrow).

[187] 390 F.3d 53, 62 (1st Cir. 2004).

[188] The court held that a judicial bypass hearing was not an appropriate forum for determining the necessity of health-related abortion because courts were allowed seven days to rule on any petition and the delay could "adversely affect[ ]" the minor's health. *Id*.

[189] *Id.* at 62.

gamble with their patients' lives in the hopes of complying with the notice requirement before a minor's death becomes inevitable, or . . . risk criminal and civil liability by providing an abortion without parental notice."[190] Within the notice time period of forty-eight hours, physicians could not, in most circumstances, determine with certainty that abortion was the only option available to avert death.[191]

In *Ayotte v. Planned Parenthood of New England*, a unanimous Supreme Court avoided ruling on the constitutional questions raised by *Planned Parenthood of Northern New England v. Heed*.[192] Although the Court held that the New Hampshire statute as applied may violate the Constitution in some situations,[193] it remanded the case so that the lower court could sever any offending provisions.[194] The Court determined that in remedying a constitutionally defective statute, courts should look to legislative intent and void specific provisions rather than enjoin the entire statute.[195]

Ayotte is significant not only because it reaffirmed that "[s]tates unquestionably have the right to require parental involvement,"[196] but also because it signaled the Court's unwillingness to strike down an entire statute.[197] Moreover, the First Circuit's holding that the New Hampshire law was unconstitutional because it lacked a health exception predates decisions on health exceptions in another context. In *Gonzalez v. Carhart*, the Court upheld the federal Partial Birth Abortion Ban Act despite the Act's omission of a health exception that allowed the banned procedure when the woman's health was in danger.[198] After *Carhart*, reproductive rights lawyers might hesitate to ask the Court to decide the constitutionality of a law that narrowly defines the health grounds for an abortion performed because of medical emergency.

---

[190] *Id.* at 63.

[191] *Id.*

[192] 546 U.S. 320, 331 (2006).

[193] In addition to the ruling on the medical exception requirements, the First Circuit found the law's protections of the minor-petitioner's confidentiality lacking. *Heed*, 390 F.3d at 64–65.

[194] *Ayotte*, 546 U.S. at 331–32.

[195] *Id.*

[196] *Id.* at 326.

[197] *Id.* at 331–32.

[198] 550 U.S. 124, 165–67 (2007). The Court held that medical evidence did not conclusively establish that an abortion procedure popularly known as partial birth abortion and clinically described as intact dilation and extraction was necessary (in comparison with other available procedures) to protect the woman's health. *Id.* at 162–63, 166–67. Critics argue that the decision minimizes the opinion of medical experts, who testified to the safety and health benefits for women, and incorrectly emphasizes the emotional harm that the abortion procedure at issue in *Carhart* may cause women. *See, e.g.*, Priscilla J. Smith, *Responsibility for Life: How Abortion Serves Women's Interests in Motherhood*, 17 J.L. & POL'Y 97, 142–44 (2008) ("physical safety and [the] decision *not* to mother . . . are now pitted against what the Court assumes will be the woman's horror if she comes to regret her abortion and then finds out how the abortion was performed").

2. *Risks of As-Applied Litigation*

As recognized by reproductive rights lawyers, even successful litigation may have costs.[199] Challenges to the constitutionality of parental involvement laws as enacted must confront previous decisions. But arguably the bypass process functions so poorly in some jurisdictions, that very few minors in some states can petition a court for an order waiving parental consultation. In this situation, a court might find that the implementation of a consent law is unconstitutional as applied[200] if minors in a state do not have a viable alternative to parental involvement.[201] Although an unlikely result, if it occurred, the remedy might be an injunction or negotiated consent decree, which would specify steps for ensuring that bypass hearings were more widely available.[202] But a remedy that potentially forces judges with religious objections or political qualms to hear petitions could have negative consequences for petitioners.[203] Judges in some states (particularly in elected positions) are under intense pressure from state "Right to Life" committees to oppose abortion generally and to make a public commitment to deny bypass petitions specifically.[204]

Judges, as well as court clerks, lawyers, and others, need training and education, but the infrastructure for it does not currently exist.[205] Advocates might worry that state-created training programs or guidelines for bypass

---

[199] *See* REPORT ON A MEETING, *supra* note 13, at 17.

[200] *See, e.g.*, Barnes v. Mississippi, 992 F.2d 1335, 1342–1343 (5th Cir. 1993) (finding that petitioner's arguments regarding institutional barriers to the law's fair application held weight; petitioners claimed that courts were "unable to implement the statute in a constitutional manner" because "most court clerks are either unfamiliar with the bypass procedures or are completely unaware that a minor could obtain an abortion without her parents' consent" and "there are insufficient [judges] to hear cases and that court-appointed counsel will be difficult to obtain.").

[201] Sanger describes the damage to the legitimacy of the legal system when minors cannot find a court that will hear a judicial bypass petition: "[f]orum exclusion tells [minors] that their claim falls below the requirements of justice and that the problem of how to gain access to courts is theirs alone to solve." Sanger, *supra* note 99, at 455.

[202] Attorneys may not welcome the prospect of courts, after a successful as-applied challenge, managing the process of implementing new standards for judicial bypass hearings. Scholarship too substantial to capture here details the advantages and disadvantages of courts issuing orders that result in court management of complicated public institutions. *See, e.g.*, Colin S. Diver, *Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 45–46 (1979) (summarizing scholarship critical and supportive of judicial management of systemic reform).

[203] Sanger, *supra* note 99, at 492–96 (describing examples of judges' political and religious objections to abortion).

[204] *See id.* at 496; *see also, id.* at 494 (discussing "[t]he official 2006 platform of the Texas Republican Party, [which] called for the 'electoral defeat of all judges who through raw judicial activism seek to nullify the Parental Consent Law by wantonly granting bypasses to minor girls seeking abortion [sic].'").

[205] *See, e.g.*, Helena Silverstein & Leanne Speitel,*"Honey, I Have No Idea": Court Readiness to Handle Petitions to Waive Parental Consent for Abortion*, 88 IOWA L. REV. 75, 107–08 (2002–03) (describing the widespread lack of preparedness in one state's courts and the reticence on the part of judges and court staff to deal with bypass petitions).

hearings might create additional avenues to courts, but also might reduce the likelihood of a successful petition. For example, courts, court administrative bodies, or the state legislature could undertake defining what constitutes maturity or best interests. However, these bodies might draft definitions that are too narrow or out of step with adolescent experience and cognitive ability.[206]

State court decisions that consider the minor's demeanor at a hearing as part of the maturity analysis illustrate a concern about defining statutory terms. Some state appellate courts affirm lower courts' decisions in which the judge relies on the minor's demeanor to assess maturity.[207] An Alabama appellate court affirmed the denial of a petition because "the answers given by the minor appeared to be [given] in an almost rehearsed manner. There was not any expression of emotion from either the minor or the godmother [who] also testified."[208] An Ohio Court of Appeals affirmed the decision of a trial court that assessed the minor's demeanor in analyzing maturity, but came to the opposite conclusion. The minor displayed too much emotion: "[c]omplainant's decision to seek an abortion appears to result from panic rather than well-reasoned and careful decision-making. Even though complainant does well academically in school and has plans to attend college, she failed to convince this Court that she truly understood the full impact of having an abortion."[209] Guidelines signposting how minors should behave in a hearing may penalize mature minors who, for whatever reason, do not (or never will) comport with a judge's expectations.

B. Legislative Amendment or Repeal

An inherent risk of pursuing litigation is that resulting court decisions may make matters worse. Likewise, appealing to state politicians to repeal or to amend parental involvement laws is also a complicated endeavor. Only the New Hampshire legislature repealed its parental involvement law, and only New Mexico's Attorney General has refused to enforce the state's consent law.[210] Politicians across party lines appear to believe that parental involvement laws are the best of all worlds—they are "pro-life, pro-choice, and pro-family all at once."[211]

---

[206] *See, e.g.*, Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making,* 68 TEMPLE L. REV. 1763, 1768 (1995) ("[M]ost studies indicate that there are few, if any, differences between the cognitive processes of adults and adolescents.").

[207] *See* BYPASSING JUSTICE, *supra* note 9, at 21 (summarizing some cases in states where courts have made demeanor part of the maturity analysis).

[208] *Ex parte* Anonymous, 812 So. 2d 1234, 1236 (Ala. 2001) (alteration in original).

[209] *In re* Jane Doe, 749 N.E.2d 807, 809 (Ohio Ct. App. 2001).

[210] Press Release, N.H. Gen. Court, *supra* note 24; N.M. Op. Att'y Gen. No. 90-19, *supra* note 24 (declaring New Mexico's parental notification law unenforceable because, among other reasons, the statute does not provide for a bypass procedure).

[211] REPORT ON A MEETING, *supra* note 13, at 2. For a fuller discussion of the politics underpinning parental involvement laws, *see* RED FAMILIES, *supra* note 173, at 100–101

Bipartisan acceptance of parental involvement creates significant barriers to reform in some state legislatures, and pro-choice advocates routinely lose battles over bills that make consent or notice laws more restrictive.[212] For example, recent legislative proposals in Mississippi and Arizona illustrate revived interest in the burden of proof standard for maturity. Both bills required that the minor prove her maturity by clear and convincing evidence rather than by the preponderance of evidence.[213] Proponents of this type of legislation argue that the current law is "very easy to go around."[214]

Indeed, putting any aspect of a parental involvement law back on the legislative agenda may result in bills that make laws more, not less, complex. As noted, most statutes refer to providers' duty to use reasonable means to verify parental identity, but that duty is often vaguely stated.[215] Providers are vigilant in documenting notice and consent, and may impose requirements beyond what the law demands.[216] Yet recent changes to the Arizona consent statute demonstrate many legislatures' general suspicion of abortion providers.[217] The revised law preserves the ability of a parent to sue a provider for failure to secure their consent for up to six years after the minor's procedure.[218]

Teresa Stanton Collett argues that state legislators' antipathy for abortion providers is well-placed.[219] She states that many young women are pregnant from relationships with substantially older men and that clinics treat "confidentiality [as] more important than insuring legal intervention to stop the sexual abuse."[220] According to Collett, physicians cannot be trusted

---

(noting that "blue" states identified with Democratic politics pass less restrictive parental involvement laws, whereas "red" states that typically vote Republican enact more restrictive consent laws with fewer exceptions); *see also* Sanger, *supra* note 99, at 477 (noting that progressives have supported parental involvement laws to appeal to the electorate).

[212] *See* Bypassing Justice, *supra* note 9, at 46.

[213] *See, e.g.*, H.B. 2564, 49th Leg., 1st Reg. Sess. (Ariz. 2009) (shifting burden to prove maturity by clear and convincing evidence and directing judges to assess minors' experience level, perspective, and intellectual ability); S.B. 2391, 2007 Leg., Reg. Sess. (Miss. 2007) (proposing a clear and convincing evidence standard). This is not intended to discount the success advocates have had in defeating bills in various states that would make notice or consent laws much more restrictive. *See* S.B. 1504, 110th Leg., Reg. Sess. (Fla. 2008) (bill prohibiting a non-resident from petitioning for a bypass); H.B. 2292, 82nd Leg., Reg. Sess. (Kan. 2007) (bill prohibiting clinic staff from assisting minor with bypass proceedings, as well as increasing reporting duties to the state); S.B. 1059, 94th Leg., Reg. Sess. (Mich. 2008) (bill disallowing a minor from filing in another court after denial of a petition).

[214] John Frank, *Bill will make it harder for Florida teens to get an abortion*, Miami Herald, Apr. 14, 2010, *available at* http://www.miamiherald.com/2010/04/14/1578145/bill-will-make-it-harder-for-florida.html#ixzz0y3DwiK51. The Florida bill introduced last year elevated the standard of proof, required parents to notarize consent, and created a longer timeframe for courts hearing petitions. *Id.*

[215] *See supra* Part II(A).

[216] Bypassing Justice, *supra* note 9, at 35–37.

[217] *See id.* at 46 (describing hostile legislative environment for abortion providers).

[218] Ariz. Rev. Stat. Ann. § 36-2152(K) (2009 & Supp. 2009).

[219] Teresa Stanton Collett, *Protecting Our Daughters: The Need for the Vermont Parental Notification Law*, 26 Vt. L. Rev. 101 (2001–2002).

[220] *Id.* at 111, 120.

to give their patients accurate information about the alternatives to and risks of abortion: "[m]any minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent or unethical."[221]

Her claims are contested at best and mirror the premises of parental involvement laws.[222] Many states' statutes, however, are based on beliefs that young women make poor decisions, and parents, not providers, are in the best position to protect a minor's health after an abortion.[223] A number of parental involvement laws mandate providing minors with detailed literature or counseling on risks or alternatives to abortion.[224] In the same vein, despite extensive medical evidence of abortion's safety,[225] some state laws require providers to disseminate materials that often overstate the risks of abortion.[226]

The divisiveness over abortion in the current political environment supports the belief that stricter laws protect vulnerable minors. Although some research suggests that the majority of Americans do not support laws that

---

[221] *Id.* at 112 (quoting Bellotti v. Baird, 443 U.S. 622, 641 n.21 (1979)).

[222] *See* BYPASSING JUSTICE, *supra* note 9, at 36 ("Participants discussed their diligence in complying with child abuse and assault reporting requirements . . . ."); *see, e.g.*, Jacqueline E. Darroch et al., *Age Difference Between Sexual Partners in the United States*, 31 FAM. PLAN. PERSP. 160, 166 (1999) (arguing that the proportion of adolescents with older sexual partners is similar to the percentage of adult women with older partners, and finding that adolescents with partners three or more years older are more likely to give birth but *less* likely to have an abortion than their peers with partners of approximately the same age).

[223] *See, e.g.*, TENN. CODE ANN. §§ 37-10-301(2), (5) (2005) (legislative findings state "the medical, emotional, and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature . . . parents who are aware that their minor daughter has had an abortion may better ensure that their daughter receives adequate medical attention after the abortion.").

[224] For example, Louisiana's consent statute permits courts to order counseling for the minor before the bypass hearing to "examin[e] how well the minor interviewed is informed about pregnancy, fetal development, abortion risks and consequences, and abortion alternatives, and . . . endeavor to verify that the minor is seeking an abortion of her own free will and is not acting under intimidation, threats, abuse, undue pressure, or extortion by any other persons." LA. REV. STAT. ANN. § 40:1299.35.5(B)(3)(b)(ii) (2010); *see also* Frank, *supra* note 214 (describing Florida bill "measure to mandate a judge determine [sic] whether a minor is aware of the 'shortage of unborn babies available for adoption'").

[225] *See* Karen Pazol et al., *Abortion Surveillance-United States, 2006*, 58 SURVEILLANCE SUMMARIES 1, 4 (Nov. 27, 2009), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5808a1.htm?s_cid=SS5808a1_e ("In 2005, the most recent year for which data were available, seven women were reported to have died as a result of complications from known legal induced abortions;" in 2005, 820,151 total abortions were performed in reporting states).

[226] Chinué Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, 9 GUTTMACHER POL'Y REV. 6, 6 (2006) ("In some cases, the state goes so far as to include information that is patently inaccurate or incomplete, lending credence to the charge that states' abortion counseling mandates are sometimes intended less to inform women about the abortion procedure than to discourage them from seeking abortions altogether.").

would ban abortion,[227] the extent to which anti-abortion sentiment shapes legislative agendas is incontrovertible.[228] Since *Roe v. Wade,* states have steadily restricted access to abortion through laws that dictate how and when women may access abortion services.[229] Parental involvement laws reflect broader state activity in restricting abortion and implicate the equally controversial issue of young women's readiness for sexual activity.[230]

At the heart of the debate is whether abortion and sex among teenagers result in emotional harm or negative outcomes in school or other areas.[231] Consent and notice laws purport to protect minors from risky sexual behavior or rash decisions about pregnancy by making them confront parents with the fact of their pregnancy.[232]

The premise that parents are best suited to monitor adolescent decisions about sex features prominently in the legal system. In the recent past, policies actively and publicly punished teenage pregnancy and sexuality through school expulsions, maternity homes, and criminal penalties.[233] It was not until the 1970s that most teens could make independent decisions about birth

---

[227] *See* Poll, THE NEW YORK TIMES/CBS NEWS (Sept. 12–16, 2008), *available at* http://www.rhrealitycheck.org/emailphotos/pdf/NYTCBS_Abortion_POLL.pdf (37% of poll respondents believe "[a]bortion should be generally available to those who want it" and 42% answered that "[a]bortion should be available but under stricter limits than it is now;" only 19% thought abortion should not be permitted).

[228] *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 377 (2007) (describing backlash to *Roe*).

[229] For a summary of laws that restrict abortion access, see CENTER FOR REPRODUCTIVE RIGHTS, Roe v. Wade *in the States* 1, 1–3 (2007), *available at* http://reproductiverights.org/en/document/overview-of-types-of-abortion-restrictions-in-the-states.

[230] For example, note the legislative intent of Wisconsin's parental consent law: "[t]he medical, emotional and psychological consequences of abortion and of childbirth are serious and can be lasting, particularly when the patient is immature. The capacity to become pregnant and the capacity for mature judgment concerning the wisdom of bearing a child or of having an abortion are not necessarily related." WIS. STAT. § 48.375 (2–3) (2007–08).

[231] *See* Jocelyn T. Warren et al., *Do Depression and Low Self-Esteem Follow Abortion Among Adolescents? Evidence from a National Study*, 42 PERSP. SEXUAL REPROD. HEALTH 230, 233 (2010) (showing no association with depression or low self-esteem and abortion for adolescents); *see also* Guggenheim, *supra* note 133, at 625–26 (setting out the reasoning of *Bellotti* regarding the rights of parents, the assumed immaturity of minors, and the limitations imposed on the parent who potentially acts arbitrarily); Bill McCarthy & Eric Grodsky, Sex and School: Adolescent Sexual Intercourse and Education 2 (unpublished manuscript) (on file with author) (showing that sexually active minors in romantic relationships do not necessarily exhibit greater social or behavioral problems than those minors who are abstinent).

[232] Indeed, the justification repeated in the legislative intent of parental involvement laws is that they foster parent-child communication, which is in the best interests of the minor. *See, e.g.*, ALA. CODE § 26-21-1 (2009) ("parental consultation is usually desirable and in the best interests of the minor"); IDAHO CODE ANN. §18-602(2)(d) (2004) ("providing a pregnant minor with the advice and support of a parent during a decisional period"); W. VA. CODE § 16-2F-1 (LexisNexis 2006) ("parental consultation regarding abortion is usually desirable and in the best interest of the minor").

[233] Sanger, *supra* note 99, at 476.

control, much less abortion, without parental approval.[234] Consent or notice laws may appear aberrant in light of a longer history of the previous harsh public sanctions of extramarital teen sex.

Thus, it may not be surprising that many consider minors who avoid parental involvement (through a bypass hearing or other means) suspect.[235] Even though most minors consult their parents about abortion on their accord,[236] the long-standing deference to parents in law may make any circumvention of parental involvement feel counter-intuitive to many. Parental autonomy has been described as having the veneer of natural law—it is older than the Constitution,[237] and is part of the "parents' natural inclinations to care for their children, especially when children reside with their parents and their family relationship is normal."[238] Rights of parents to control "the home" are at the core of traditional notions about how adult citizens limit the intrusion of government in a constitutional democracy[239] and protect their children's future ability to exercise their rights.[240]

The legal system affirms parents' supervision and control of children in most areas, right up to the age of majority.[241] Adolescence can be invisible

---

[234] RED FAMILIES, *supra* note 173, at 83 (noting that until 1977 all states required parental consent for contraceptive use).

[235] Naomi Cahn and June Carbone note the religious foundations of this attitude: premarital sex is a sin, and those adolescents that engage in sex should bear the consequences of that choice. RED FAMILIES, *supra* note 173, at 96. Sanger also describes minors seeking a bypass being cast as those "sneak[ing] around the very wages of sin." Sanger, *supra* note 99, at 464.

[236] *See supra* note 152 and accompanying text.

[237] Guggenheim, *supra* note 133, at 603. Privileging parental rights in American constitutional law and tradition has also engendered criticism. *See* Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 29 (1999) (arguing that the reification of parental autonomy cuts against the recognition of children's rights, which "challeng[e] American history and tradition but [are] rooted in broad concepts like liberty, equality, and especially dignity").

[238] *See* Richard Storrow & Sandra Martinez, *"Special Weight" for Best Interests Minors in the New Era of Parental Autonomy*, 2003 WIS. L. REV. 789, 805 (2003).

[239] *See* Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 985–86 (1992–93).

[240] *Id.* at 990–91. The democratic rationale for protecting parents' rights is at the heart of *Bellotti*, which describes the family as the "the institution by which 'we inculcate and pass down many of our most cherished values, moral and cultural' " Bellotti v. Baird, 443 U.S. 622, 634 (1979) (quoting Moore v. East Cleveland, 431 U.S. 494, 503–04 (1977)). The conception of the private family that thwarts government control and instills democratic values in the next generation has been the subject of varied and extensive critique. *See, e.g.*, Frances Olsen, *The Myth of State Intervention in the Family*, 18 MICH. J. L. REFORM 835, 835–36 (1985) (arguing that by virtue of passing and implementing laws that define and affect the family, the state is always part of the mythical "private family").

[241] Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 559–60 (2000–2001). The Supreme Court case, *Troxel v. Granville*, brought contemporary meaning to the traditional assertions of parents' rights. 530 U.S. 57, 65 (2000). In a plurality decision, the Court held that granting visitation to a child's grandparents over a parent's wishes violated that parent's substantive due process rights of "care, custody, and control" of her child. *Id.* at 72. *Troxel* may not apply to areas where the Court

in the law, because regardless of whether someone is sixteen or six, many of the same restrictions and protections apply.[242] Moreover, the contemporary rights that parents exercise for their children are many—the right to direct or control religious training, wages and finances, consent to marriage and legal decision-making, and choices in education.[243] With notable common law and statutory exceptions, parents exercise authority over their children's medical care.[244]

Because abortion is one of the few exceptions to the control that parents exert, consent and notice laws reflect reasoning that justifies their "exceptional" status. Parental authority should be restricted if it serves an important social purpose (preventing unwanted motherhood for teenagers), or if there is a likelihood that parents might not act in accord with minors' best interests.[245] Both propositions are contested, and fuel the larger debate over parental involvement laws. Martin Guggenheim notes that most modern statutory exemptions to parental consultation in minors' health care decisions—such as STI testing—create "sensible public health rules."[246] Legislating for abortion seems to afford no such sensibility: "[f]or better or worse, it simply is not currently possible in the United States to rely on the political process to satisfactorily resolve the deeply contentious abortion issue."[247]

Attempts to change parental involvement laws invariably become embroiled in debates about safeguarding parental interests and the legitimacy of permitting minors to avoid parental consultation in their reproductive choices. The next section describes how reproductive rights advocates have tried to change the public conversation, but may not have challenged core beliefs supporting parental rights.

C. Public Opinion Appeals

In response to these political and legal hurdles to reform, some national and state-based groups have pursued publicity campaigns in hopes of shift-

---

has set out competing constitutional rights of minors, but it illustrates the deep deference and "special weight" accorded to parents in making decisions for their children. *Id.* at 69.

[242] Scott, *supra* note 241, at 555–56.

[243] *See* Guggenheim, *supra* note 133, at 638–39 (describing how children are not treated by laws "as autonomous agents empowered to make significant decisions in their lives.").

[244] Storrow & Martinez, *supra* note 238, at 794. The "mature minor doctrine" is a common law rule that permits mature adolescents to give consent for medical care. Not all state courts recognize the doctrine. *See* Scott, *supra* note 241, at 567–68. *See generally* Garry Sigman & Carolyn O'Connor, *Exploration for Physicians of the Mature Minor Doctrine*, 119 J. PEDIATRICS 520 (1991) (using court vignettes to describe the modern reception of the mature minor doctrine).

[245] *See* Scott, *supra* note 241, at 569–76.

[246] Guggenheim, *supra* note 133, at 642.

[247] *Id.* at 643.

ing attitudes about adolescent sexuality and abortion.[248] Gaining little ground using rhetoric that promotes adolescents' rights, opponents of parental involvement laws rely on images of the "bad parent" who is unfit to exercise her authority.[249]

This message has been somewhat successful. A recent example was the fight over the California ballot initiative (Proposition 4) that would have amended the state constitution to require parental notice forty-eight hours before a minor's abortion.[250] Pro-choice advocates conducted extensive public attitude surveys and aired commercials intended to garner sympathy for minors who cannot, because of abuse or family economic instability, tell their parents they are pregnant.[251] They depicted the consequences for minors as dire—teens forced to alert parents to their pregnancies will resort to illegal terminations or worse.[252] This message is commonly repeated: telling parents about pregnancy and abortion choices risks harm to a minor by "exacerbat[ing] already volatile intrafamily dynamics and place the minor in danger."[253] The response of those in favor of parental involvement is also predictable: consent or notice statutes do not hurt minors; "child predators" do.[254] Although the proposition failed, the message of the opposition's campaign implicitly affirms the perception that adolescents without abusive or absent parents should not need to bypass parental consultation.

The same messages surfaced recently in the debate over the Alaska's 2010 ballot measure, although with less success. Mirroring the Proposition 4 campaign, opponents of the proposed parental notice law sponsored ads that featured the voice of an adult commenting that her daughter would ask

---

[248] *See, e.g.*, *Resources: Minors' Access Cards,* PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH, http://www.prch.org/resources-minors-access-cards (last visited Oct. 30, 2010) (summarizing laws on the provision of reproductive health services to minors in thirteen states).

[249] *See* REPORT ON A MEETING, *supra* note 13, at 4 ("publicity campaigns asking viewers to empathize with teens who lack parental support have helped to defeat parental involvement bills").

[250] Propositions on parental notice have failed to pass twice before—Proposition 85 in 2006 and Proposition 73 in 2005. *See* Proposition 85, Official Title and Summary, *available at* http://www.sos.ca.gov/elections/vig_06/general_06/pdf/proposition_85/entire_prop85.pdf; Proposition 73, Official Title and Summary, *available at* http://vote2005.sos.ca.gov/voterguide/prop73/title_summary.shtml. *See Waiting Period and Parental Notification*, HEALTHVOTE.ORG, http://www.healthvote.org/index.php/site/prop_home/C36/ (last visited Nov. 15, 2010) (reporting voting outcome for Proposition 85); *Parental Notification*, HEALTHVOTE.ORG, http://www.healthvote.org/index.php/site/prop_home/C31/ (last visited Nov. 15, 2010) (reporting voting outcome for Proposition 73). If Proposition 4 had passed, advocates were prepared to challenge the law under the state's constitution. *See Proposition 4*, LEAGUE OF WOMEN VOTERS OF CALIFORNIA EDUCATION FUND, http://www.smartvoter.org/2008/11/04/ca/state/prop/4/ (last visited Oct. 30, 2010).

[251] *See Teen Safety*, PLANNED PARENTHOOD AFFILIATES OF CALIFORNIA ACTION FUNDS, http://www.ppactionca.org/issues/teen-safety.html (last visited Oct. 30, 2010).

[252] *Id.*

[253] Storrow & Martinez, *supra* note 238, at 802.

[254] *See* YES on 4/Child and Teen Safety and Stop Predator Act: Sarah's Law, http://www.YESon4.net (last visited Oct. 30, 2010).

for advice if she were pregnant, but that other girls are not as fortunate.[255] The speaker's message is that only for the minority of families is parental involvement inappropriate or objectionable. Public opinion campaigns, whether they support or reject parental involvement, rely on messaging that supports the rights of "fit" parents. For example, proponents of the Alaskan ballot initiative equated notice of abortion to all other areas of parental control: "[w]e take it for granted that parents are required to give their consent, or at least be notified, before their child can get an aspirin at school, have her ears pierced, get a tattoo, go to an R-rated movie, or attend a field trip."[256] Opponents also appealed to parental control of the home: "[E]lection Day is tomorrow! It's time to show that we won't stand for the government and bureaucrats in our living rooms."[257]

These publicity campaigns, however, do not necessarily challenge the attitudes that make parental control over minors' pregnancy decisions so popular—that "good" parents should be able to guide the reproductive decisions of their daughters. The top-down approaches of litigation, legislation, and public campaigns do not reach the nuanced and entrenched beliefs about parents, their daughters, and procreative decisions that operate at multiple levels of political and cultural experience.

A public education campaign comes closest to a reform strategy that could help shape the attitudes of those that work directly with minors. However, those interviewed by the National Partnership did not recommend any of the three strategies discussed in this Part as ways to move the debate past the current standstill. For this reason, the study did not advocate repeal or revision of state statutes. It did not argue for a litigation strategy to expose the constitutional deficiencies of parental involvement laws or purport to be a tool for those who might lobby state lawmakers. Instead, it incorporated the comments of interviewees who spoke about the need for tailored reform that might influence what state actors believe they can do. Their recommendations include disseminating information, fostering dialogue among local professionals, and creating an infrastructure for legal and clinical services that is responsive to the needs of a particular jurisdiction.

IV. Reform in Uncertain Legal Spaces

Parts I and II described the difficulties with the law and its implementation, and Part III demonstrated why common strategies for reform may not change the underlying norms that make consent and notice laws so popular.

---

[255] VoteNOon2AK, *No on Ballot Measure 2 TV Ad*, YouTube (Aug. 18, 2010), http://www.youtube.com/watch?v=M_VI1iz7Fmw.

[256] Alaskans for Parental Rights Yes on 2, http://www.alaskansforparentalrights.org/about-2. (last visited Oct. 30, 2010).

[257] Alaskans Against Government Mandates: Protect our Teens and Families, Facebook (Aug. 23, 2009, 9:30 PM), http://www.facebook.com/NOon2AK?v=info&ref=TS#!/NOon2AK?.

For those who believe parental involvement laws are misguided, the remaining objective of this Article is to suggest a way forward in solving a complicated set of problems. This Part draws from the recommendations of those interviewed by the National Partnership because the collaborative, flexible, and information-driven strategies they describe resonate with an interesting area of legal thought—new governance. New governance theory applied to parental involvement laws might justify reform on new terms and foster a conversation about the risks of a collaborative approach.

A. New Governance Briefly Defined

The National Partnership's critique of parental involvement laws fits squarely within a legal realist account of the gap between the text of consent or notice statutes and the lived experience of law.[258] Unlike the Legal Realism movement that motivated Law and Society thinkers several decades ago,[259] contemporary legal realist scholarship is less concerned with the scientific study of how law might more closely resemble practice[260] and is more interested in how policy should reflect the modern complexities of governance.[261] A "new" legal realism is less legocentric: it draws from the skepticism expressed in post-modernism and Critical Legal Studies about formal law's power to change institutional or individual behavior.[262] Part of this skepticism is the result of frustrations with regulation on opposite ends of a spectrum of state control. On one hand, many criticize the centralized governance emblematic of New Deal agencies for creating paralyzing bureaucracy that blocks contextualized innovation.[263] On the other hand, devolving power to corporate entities, whose market position may drive decisions about the delivery of services, cedes public management to private bodies that are not subject to democratic checks.[264]

New governance[265] is a response to the failings of regulation by the top-down, powerful state and privatization—a "long-awaited synthesis" and

---

[258] *See* Arthur McEvoy, *A New Realism for Legal Studies*, 2005 WIS. L. REV. 433, 443 ("bring[ing] facts to bear on the management of social life" and "mak[ing] experience legally meaningful"); *see also id.* at 448–49 (listing areas where new realism has been applied).

[259] *Id.* at 443.

[260] *Id.* at 441.

[261] *See generally* Howard Erlanger et al., *Foreword: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335 (2005) (summarizing a set of papers contributed to a symposium issue of the Wisconsin Law Review on approaches to New Legal Realism).

[262] McEvoy, *supra* note 258, at 443–48.

[263] *See, e.g.*, Charles Sabel, *A Quiet Revolution of Democratic Governance: Towards Democratic Experimentalism, Organization for Economic Co-operation and Development*, *in* GOVERNANCE IN THE 21ST CENTURY 121, 138 (2001) (describing the problems with centralized regulation in the context of school reform).

[264] McEvoy, *supra* note 258, at 445–46.

[265] "New governance" is only one way to describe the method I explain here. *See* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 346–47 (2004–2005) [hereinafter

"third way between regulation and market solutions."[266] It is an approach that "seeks to reinvent governance from the 'bottom up' by rejecting ancient administrative strategies of command and control and replacing them with a continuous dynamic process governed by the relevant stakeholders."[267] The type of policy that new governance supports is thus distinct from rules that confer legal rights and remedies or penalize certain behaviors or actions.[268] Instead, new governance encourages legal intervention based on self-monitoring, participation, and information sharing.[269] Ideally, stakeholders—or public and private bodies interested in a policy working more effectively—collaborate to reach shared decisions about reform and the distribution of power and resources.[270] Although new governance emphasizes processes shaped outside of courts or legislatures,[271] it also resists complete privatization.[272] The envisioned responsibility of courts and public bodies is to en-

---

Renew Deal] (listing the various names and terms that describe new governance thinking: "This Article demonstrates how the governance model emerges from a myriad of recent scholarly theories including the following: "reflexive law," "soft law," "collaborative governance," "democratic experimentalism," "responsive regulation," "outsourcing regulation," "reconstitutive law," "post-regulatory law," "revitalizing regulation," "regulatory pluralism," "decentering regulation," "meta-regulation," "contractarian law," "communicative governance," "negotiated governance," "destabilization rights," "cooperative implementation," "interactive compliance," "public laboratories," "deepened democracy and empowered participatory governance," "pragmatic lawyering," "nonrival partnership") (citations omitted).

[266] Orly Lobel, *Formulating a New Paradigm: Newness and the Ripeness of the Moment*, 2005 Wis. L. Rev. 492, 492 [hereinafter *Formulating a New Paradigm*]; *Renew Deal*, *supra* note 265, at 343.

[267] Erlanger et al., *supra* note 261, at 357. For foundational work in new governance, *see generally* Ian Ayres & John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate 3 (1992) ("Good policy analysis is not about choosing between the free market and government regulation . . . sound policy analysis is about understanding private regulation . . . and how it is interdependent with state regulation"); Michael C. Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267 (1998) (identifying a new form of decentralized governance that depends on shared local knowledge of private and public actors); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. Rev. 875, 882 (2003) ("the way past the current impasse is to return to [a] commitment to a legal decisionmaking process that is deeply informed about the institutions with which legal actors interact . . . ."). For new governance strategies applied, *see* Louise G. Trubek, *New Governance and Soft Law in Health Care Reform*, 3 Ind. Health L. Rev. 139 (2006) (noting how new governance ideas animate specific health care reform proposals).

[268] *See Renew Deal*, *supra* note 265, at 348, 371–404 (describing how new governance challenges "conventional assumptions" of administrative laws).

[269] Trubek, *supra* note 267, at 139.

[270] *See* Joel Handler et al., *A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences,* 2005 Wis. L. Rev. 498, 500 (depicting actors in a new governance process as "consensual, deliberative, on-going").

[271] *See* Gráinne De Búrca, *Developing Democracy Beyond the State*, 46 Colum. J. Transnat'l L. 221, 228 (2008) (explaining that new governance in the transnational context is characterized by increased participation of non-state actors and embeds additional sites of political and legal intervention).

[272] *See Renew Deal*, *supra* note 265, at 389 ("At its best, however, the governance model assumes a harder definition of soft law; one that preserves an active role for the state and the legal regime.").

force benchmarks of "effectiveness, efficiency, and equity."[273] Law remains important as a "catalyst" that sets into motion voluntary and compliance-based programs, and vets problems that arise if self-monitored systems fail.[274]

The appeal of new governance is its potential to offer an alternative process for issues where discretion characterizes the implementation of law and litigation and statutory revision has had limited success.[275] Although originally applied in administrative and regulatory settings, new governance has influenced "an array of substantive domains, including employment, occupational safety, environmental regulation, community policing, education, corporate governance, community lawyering, anti-discrimination, constitutionalism, and healthcare."[276] The goal of reconfiguring all aspects of public institutions (from their management to their culture) resonates with those frustrated by the lack of response by public bodies or private entities after winning rights for marginalized populations in court or in statutes.[277]

For example, new governance ideas have some traction in efforts to reduce gender bias in the workplace.[278] Traditionally, statutes punish individuals that discriminate against women and employers that are complicit in discrimination (such as creating a hostile work environment); courts enforce anti-discrimination laws through the adversarial process.[279] However, systemic gender discrimination can be difficult to prove, especially because gender bias usually exists on the levels of institutional culture, interpersonal interactions, or the discretion of lower or mid-level managers that shape how women are treated.[280] Court intervention can entrench exclusionary attitudes or practices because it incentivizes employers to ignore or hide evidence of unfair treatment to avoid the costs of litigation.[281]

---

[273] Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 Fordham Urb. L.J. 1611, 1647 (2001).

[274] Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 521–22 (2001) [hereinafter *Second Generation Employment Discrimination*].

[275] NeJaime, *supra* note 17, at 324, 339; *cf.* Guggenheim, *supra* note 133, at 633–34 (describing how the maturity and best interests standards afford judges wide discretion).

[276] NeJaime, *supra* note 17, at 338–39.

[277] *See id.* at 324–25 (arguing that new governance offers cause lawyers an alternative to a rights critique).

[278] *See, e.g.*, *Second Generation Employment Discrimination*, *supra* note 274, at 522–25 (applying a structural, collaborative model to solving the problems associated with discrimination in the workplace); *see also* Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 Harv. J.L. & Gender 247, 251 (2006) [hereinafter *Architecture of Inclusion*] (arguing that "innovative public initiative" helped "increase the participation of women in academic science").

[279] *Second Generation Employment Discrimination*, *supra* note 274, at 475–76.

[280] *Id.* at 460–61.

[281] *Id.* at 467, 522 (arguing that legal systems will bend to court intervention but not necessarily in productive ways; court intervention can "trigger strong resentment and resistance, and [it invites] strategic behavior aimed at minimizing the impact of the law").

Constructing an approach that relies on stakeholder participation rather than courts, Susan Sturm argues that the internal policies of employers, supported by non-profit organizations and government resources, can better respond to gender bias.[282] She details the "women's initiative" of a major company, created through the leadership of high-level management who recognized that the turnover of women employees was draining the corporation's talent pool.[283] An internal task force partnered with a non-profit organization committed to workplace fairness to study why women left the company.[284] The task force found that work-life balance, a male-dominated culture, and a lack of women in leadership positions created obstacles to women's career advancement.[285] The company responded by creating a retention program administered by line managers in regional offices that instituted transparent processes for work assignments and created benchmarks for implementation, the realization of which affected the promotion opportunities of upper management.[286] This approach appears to have achieved the goal of retaining more women employees.[287]

Interestingly, the National Partnership's findings about how people improve the local implementation of consent and notice laws reflect new governance ideas.[288] The next section explores how the collaboration among clinical and legal professionals in some states involves practices that are central to new governance projects.

B. The New Governance Aspects of Interviewees' Recommendations

One goal of the National Partnership's project was to understand what makes the difference in places where gatekeepers to clinical and legal services decide to assist minors in the bypass process.[289] As this section describes, the processes in these places share some common characteristics.[290] Professionals in different practice settings form relationships in order to develop and disseminate reliable information for minors and for each other. These professionals—clerks, lawyers, judges, advocates, or clinic staff—adopt practices that minimize the logistical barriers to securing consent or notice or to filing a petition for a bypass. As a result, the parental involvement system acquires a professionalism that can help ensure bypass hearings are timely, confidential, and humane. Because laws differ from state to

---

[282] *See* Salamon, *supra* note 273, at 1639 (arguing new governance promotes public officials in the role of the "good inspector").

[283] *Second Generation Employment Discrimination*, *supra* note 274, at 492–93.

[284] *Id.* at 493.

[285] *Id.* at 494.

[286] *Id*. at 495–96.

[287] *Id.* at 498–99.

[288] *See* Salamon, *supra* note 273, at 1620 (describing the importance of "implementation studies" in revealing the problems with public programs).

[289] BYPASSING JUSTICE, *supra* note 9, at 6.

[290] *Id.* at 53–57.

state, the practices that accomplish these ends respond to the context of the jurisdiction.

These problem-solving methods mirror key features of the reform called for by new governance scholars: collaboration among stakeholders, information collection and distribution, private-public relationships, and context and flexibility in design.[291]

First, recommendations reported by the National Partnership emphasize the need for collaboration among stakeholders.[292] The bypass functions reasonably well in jurisdictions where agreements between judges, state officials, clinics, and lawyers inform the delivery of services. For example, a lawyer can broker friendships in the local court, which make filing and judge selection easier, or a clinic might work consistently with court clerks and social services so that trust is established.[293] Proponents of new governance argue that building relationships can "defuse adversarial interactions."[294]

Another benefit of collaboration (and similarity of new governance) is the creation of networks with "fluid and permeable boundaries between private and public" forums.[295] For example, some jurisdictions consolidate information about legal and clinical processes on websites or through hotlines for minors[296] and for those that a minor may contact first for assistance, like clinicians, social workers, staff members of community clinics, and school personnel.[297] Often the most helpful information captures the nuances of how the system works—for example, which judge is willing to hear petitions or what types of assistance various abortion providers offer a minor. This communication is often not for public consumption. Interviewees spoke about the need to have confidential and tightly controlled networks of knowledge.[298] Judges expressed concern that too much publicity around the bypass's existence will scare away judges otherwise willing to hear petitions.[299] As one judge stated, "If we begin training and calling attention to the fact that we have a bypass process, and most people don't know that we have it in the first place, there may be a groundswell of activity against it—a grassroots sort of thing that blames judges for the bypass existing and makes hearings harder to conduct."[300] Likewise, in some locales, counselors at

---

[291] *See Renew Deal*, *supra* note 265, at 371–404 (listing the characteristics of new governance).

[292] *See id.* at 377 (stakeholders become "involved in the process of developing the norms of behavior and changing them . . . a shared problem-solving process rather than an ordering activity.").

[293] *See* BYPASSING JUSTICE, *supra* note 9, at 54–55 (describing how professionals might coordinate resources in a state).

[294] NeJaime, *supra* note 17, at 332; Trubek, *supra* note 267, at 139.

[295] *Renew Deal*, *supra* note 265, at 374.

[296] BYPASSING JUSTICE, *supra* note 9, at 55.

[297] Some health care providers, for example, reported that minors are likely to tell a school official first about their pregnancies. *Id.* at 47.

[298] *See id.*

[299] *See id.* at 28.

[300] *Id.*

state health departments or state-funded family planning clinics work "behind the scenes" by providing information and helping minors navigate the bypass system.[301] Their conduct might change were their actions reported widely, especially if their colleagues believe that state policies on abortions limit the help they can provide pregnant minors.[302]

Perhaps the most effective strategy to assembling sensitive information is the approach of a clinic in one jurisdiction where the bypass is a viable option. The largest abortion provider in the state gathers contact information for courts, attorneys, and social workers; creates county-by-county files with relevant court documents and instructions; and consistently updates information through a well-developed network of contacts.[303] In addition to organizing information, the clinic is able to provide information about the state's law to those they contact.[304]

Centralized resources—public or confidential—require a manager that need not always be the state's major provider. Non-profit organizations advocating on behalf of women or providers that do public policy work can also take up the task of coordinating information.[305] Lawyers may also play a crucial role. In some counties, volunteer attorneys take part by not only representing minors but also developing materials, such as model orders or petitions.[306] Good relationships between health care and legal professionals or advocacy organizations and state agencies enable those assisting minors to rely on such materials.

Building relationships suggests another new governance element: private and public relationships can help create workable processes for minors. Parental involvement laws depend on state institutions because the alternative to notice or consent of a parent is usually a court.[307] Moreover, clinics and other health care providers, even when minors do not elect to pursue a bypass, operate under intense state regulation and scrutiny.[308] Private clinics and members of civil society have no choice but to engage with state actors. Thus, the relationships among state and non-state actors can make the difference between a smooth or cumbersome process. For example, some court clerks are minors' best advocates: they manage judges' schedules to accommodate bypass hearings, help prepare the minor for court, and assist attorneys and their clients with court paperwork.[309] A few court administrative

---

[301] *Id.* at 48.
[302] *See supra* note 161 (citing Texas policy restricting state funding for anyone performing or promoting abortion services).
[303] BYPASSING JUSTICE, *supra* note 9, at 41.
[304] Interview with Clinic Director (Sept. 5, 2008).
[305] *See* BYPASSING JUSTICE, *supra* note 9, at 56.
[306] *Id.* at 29.
[307] *See supra* Part I(A).
[308] *See supra* Part III(B) (describing legislative attention directed at providers).
[309] BYPASSING JUSTICE, *supra* note 9, at 43.

offices take the lead in preparing and circulating instructions to court staff about bypass procedures.[310]

This level of collaboration depends on sharing a common purpose of facilitating access to clinical and legal services for minors who want to terminate pregnancies, which can be difficult for the reasons outlined in the next section. However, evidence of how the law can harm young women in one's own city or county may bridge ideological gaps.[311] A few interviewees described working with lawyers and clerks who initially saw themselves as "outsiders" but nonetheless agreed to collaborate with those already assisting minors seeking a bypass—the "insiders."[312] After working with minors directly, they became reform-minded. One interviewee-lawyer with strongly held religious beliefs volunteered to represent minors reluctantly at first.[313] After getting to know the adolescents seeking her representation, she saw her role as providing valuable advocacy for young women who believe abortion is their best option.[314]

Others participating in bypass hearings (judges, lawyers, clerks) express a desire to protect the fidelity of law by ensuring that minors can exercise their legal rights. For example, several of the court clerks interviewed did not support abortion rights, but they went to great lengths to secure the confidentiality of files and the anonymity of the petitioner.[315] Likewise, one judge intervened when she learned of a colleague treating petitioners poorly because the conduct did not befit a member of the judiciary.[316]

Reform based on collaboration presumes a certain amount of flexibility. Participants in state bypass processes change—attorneys leave practice, old clinics close and new clinics open, judges or clerks retire.[317] The provisions of a statute may stay consistent, but how the law is practiced evolves over time. Rather than impose rules about how decisions are made, new governance may suggest a policy that allows "a range of interpretation, deviance, and trial and error."[318] However, information about how the law is practiced is difficult to gather and to maintain.[319] After consolidating various sources of knowledge about how the law works, participants have to monitor, evaluate, and disseminate data about the practice of law as the system changes.[320]

---

[310] *Id.* at 42.
[311] *See supra* Part III(C) (citing Carol Sanger).
[312] *See, e.g.*, Interview with Legal Director, State Advocacy Organization (Apr. 28, 2009) (attorneys); Interview with Director, State Advocacy Organization (Oct. 16, 2009) (clerk).
[313] Interview with Lawyer (Apr. 29, 2009).
[314] *Id.*
[315] *See, e.g.*, Interview with Juvenile Court Administrator (Apr. 17, 2009); *see also* Bypassing Justice, *supra* note 9, at 45.
[316] Transcript of Judge's Comments (Dec. 10, 2009) (on file with the author).
[317] Bypassing Justice, *supra* note 9, at 56.
[318] *Renew Deal*, *supra* note 265, at 393.
[319] Bypassing Justice, *supra* note 9, at 54.
[320] *Id.* at 54–56.

Advocacy groups for women's or reproductive rights might be helpful on this score.[321]

New governance strategies take planning and time. This level of collaboration and coordination is difficult, but not impossible given that some interviewees accomplish the tasks described here. New roles for some local actors, however, may not allay the concerns of those skeptical of new governance and its attendant ambiguity.[322] The risks of delineating space for voluntary and informal decision-making are explored in the next section.

C. Risks of a New Governance Approach

Enthusiasm for new governance should not elide its potential costs. This section acknowledges the difficulty of identifying stakeholders; doubts about the efficacy of voluntary compliance; disagreement about goals of reform; the lack of transparency in conversations among bypass participants; and the potential of new governance to entrench inequality. Reflecting on these dilemmas might prompt those committed to changing the present system to consider what consequences they will tolerate.

Ideas that animate new governance already underpin some scholarship concerned with conflicting rights of family members.[323] Martha Fineman also points to feminists' use of women's experiences to challenge state responses to "gendered violence, reproductive rights, and the relationship between husband and wife, as well as the construction of gendered roles in the family."[324] However, documenting women's "lived experience" of law does not always sit easily with the new governance move away from state monitoring and enforcement of individual rights.[325] Feminist agendas have relied on social science data to convince the state to penalize abuse perpetrators, to formalize equality protections in custody and property division for spouses, and to press for constitutional rights for reproductive privacy.[326]

---

[321] *See Second Generation Employment Discrimination*, *supra* note 274, at 523 (describing intermediaries in the gender bias context).

[322] *But see Formulating a New Paradigm*, *supra* note 266, at 497 (describing "ambiguity as an opportunity" for regulation).

[323] *See, e.g.*, David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32 RUTGERS L.J. 711, 725 (2000–2001) (arguing for a more nuanced, fact sensitive, and flexible approach to policies that seek to resolve competing interests within the family). *See generally* PAULINE TESSLER & PEGGY THOMPSON, COLLABORATIVE DIVORCE (2007) (describing methods of resolving contentious divorce outside of litigation that relies on parties' communication and collaboration).

[324] Martha Albertson Fineman, *Gender and the Law: Feminist Legal Theory's Role in New Legal Realism*, 2005 WIS. L. REV. 405, 418 (2005).

[325] *See id.* at 418, 428 (noting that a feminist contribution to legal reform was challenging and changing categorical rules, such as in divorce; elsewhere arguing, in the context of caretaking, that the state must redistribute income and restructure the workplace); *see also* NeJaime, *supra* note 17, at 328 (arguing that identity politics are closely connected to court-centered models).

[326] Fineman, *supra* note 324, at 417–18, 426 ("ask questions that translate the findings of social science into a framework for reformulating legal policy").

It seems reasonable, then, that feminists and others might question why advocates for reform should rely on decision-making processes that governments and courts cannot enforce.[327] Orly Lobel, justifying new governance methods, suggests that "building deliberative and collaborative capacities" can entice "individuals [to] follow norms against their immediate self-interest, even in the absence of the threat of formal regulatory sanction."[328] However, this may not meet the concerns of those who suspect that collaboration is not possible without a shared set of understandings.[329] If the popularity of parental involvement laws is any indication, it might be difficult to get clerks, lawyers, and judges, for example, to agree that the current system is broken in the first place.[330]

Even when professionals agree about the desirability of increasing minors' access to court and clinic services, there may be significant disagreement about why such reform is necessary. Perhaps new governance literature grapples less with the fragmentation of stakeholder interests because it has traditionally taken hold in areas where there is general agreement about the nature of the social problem at issue. Employment discrimination, for example, is generally considered undesirable and a problem that should be eradicated (despite disagreements over the definition of discrimination). Professionals who help minors circumvent parental consultation may do so for various reasons, but not because they disagree with parental consent laws generally. Those who believe that minors should have rights to make autonomous abortion decisions may come to different conclusions about the best way forward than those who believe that parental involvement laws are valuable yet poorly executed.[331]

Reaching consensus on the goals of reform may result in an overly centrist approach that seeks compromise and avoids hard debates about parental authority and teenage sexuality.[332] Because new governance concentrates on improving the forums for shared decision-making, it is naturally

---

[327] *See* Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 32 LAW & SOC. INQUIRY 501, 535 (2008) (reviewing THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR (Andrea Kupfer Schneider & Christoper Honeyman eds., 2006)) (arguing that law's role in a new governance framework is a "conceptually incoherent strategy" that may entrench inequalities among would-be collaborators).

[328] *Renew Deal*, *supra* note 265, at 384.

[329] Douglas NeJaime raises this point by referencing the movement and countermovement politics of the Christian Right, which arguably gain traction by staking out opposition to certain social justice agendas, such as gay rights campaigns. *See, e.g.*, NeJaime, *supra* note 17, at 358.

[330] WHO DECIDES, *supra* note 91, at 158 (noting popularity of laws).

[331] *See* REPORT ON A MEETING, *supra* note 13, at 3 (noting that some professionals see a benefit to parental involvement laws because it gives them a chance to tell minors about contraceptive use, or the hearing reaffirms their decision once they are found to be mature).

[332] *See* NeJaime, *supra* note 17, at 343–44 (arguing that new governance is "decidedly centrist[,] . . . giving advocates a way to devise governance systems that seek to bring about progressive change through centrist means").

focused on procedural mechanisms.[333] As the next section contemplates, professionals participating in bypass hearings might disagree about the value of abortion access, but may support proposals for creating a floor of basic fairness—ensuring the availability of forms and instructions or conducting trainings for volunteer attorneys, clinic staff, and county clerks on what the law entails. These actions may improve the process, but they might discourage a substantive conversation about the values that animate parental involvement laws.

One reason for muting a debate about the value of parental consultation is the fear that putting the issue on the public's "radar" will attract negative attention and result in legislatures making laws more restrictive.[334] New governance proposals, however, typically seek to shed light on new policies by having a transparent, open process of participation. For example, Susan Sturm's work in employment discrimination depends on clearly articulated, well-publicized internal policies for which courts can hold employers accountable.[335] This transparency provides a check on the power of private actors: policies that transfer discretion to non-state actors should monitor how private actors manage public resources or legal rights.[336] Moreover, open and participatory processes seek to restrain dominant stakeholders' power. Without transparency, reform can lack accountability, exacerbating the problems of enforcement raised at the beginning of this section and jeopardizing the perceived legitimacy of collaborative reform.[337]

A new governance approach may assume that stakeholders come to collaboration with their interests already clearly defined.[338] A "rational actor" approach sits uneasily with parental involvement laws, which start from the premise that a key stakeholder—the pregnant minor—may not have the capacity to make mature decisions.[339] Discussions about parental involvement laws have largely excluded the opinions and voices of young women.[340]

---

[333] *See id.* at 358 ("substantive agreement based on process norms").

[334] BYPASSING JUSTICE, *supra* note 9, at 47.

[335] *Architecture of Inclusion, supra* note 278, at 254.

[336] *Formulating a New Paradigm*, *supra* note 266, at 453, 464.

[337] *See* Susan Sturm, *Gender Equity Regimes and the Architecture of Learning, in* LAW AND NEW GOVERNANCE IN THE EU AND US 323, 331 (2006) ("Unless accountability concerns are built in[ ] . . . participants may not reflect the perspectives of the larger group and may not be perceived as legitimate proxies . . . .").

[338] Cohen, *supra* note 327, at 538–39 ("[N]ew governance scholars also envision a certain sort of person: one who flourishes through surprise, finding possibilities in alternative conceptions of one's interests and ends and thus forging unexpected alliances across differences.").

[339] *See* Trubek, *supra* note 267, at 156–57 (discussing new governance emphasis on "economic and informational incentives" that allow "the individual using her market power" to manage and make choices about her own health care).

[340] The Partnership's study, for example, did not include interviews with minors. BYPASSING JUSTICE, *supra* note 9, at 9; *see also* WHO DECIDES, *supra* note 91, at 71 (noting that "the voices of young women were missing in debates about parental involvement laws").

Giving minors a seat at the table would require repositioning young women as collaborators and not just patients, clients, or petitioners.

This last concern contemplates what power differentials a new governance strategy will maintain and implicitly bless.[341] Amy Cohen questions new governance's ability to realign individuals' and groups' interests through collaboration or negotiation.[342] New governance is not a neutral enterprise, but as Cohen demonstrates, "reproduce[s] th[e] conviction that collaboration and efficiency are mutually reinforcing values at the level of individual consciousness. In fact, what these skills foundationally teach lower-power parties are techniques to transform their desires and ends into interests . . . that, if achieved, can mutually serve the desires and ends of higher-power parties."[343] Even when an improved system fails, minors will still bear the costs. If a goal of reform is to empower young women, then a new governance model should try to balance minors' underrepresented interests with the interests of the judges, lawyers, clinicians, and clerks who assist them. For example, lawyers might save time, and thus be able to represent more minors, if they require all their clients to meet them at their offices or at the courts in which they practice. Although this measure may help a lawyer better respond to requests for representation, it would further isolate rural minors, exacerbating an asymmetry of resources between urban and rural teens. An uncritical approach to young women's roles might inadvertently cast them as the subjects of legal and clinical processes, and not active collaborators. The challenge for new governance, taken up by the next section, is to create a system that cuts against existing inequality and minimizes concerns of enforcement and transparency.

D. A Framework for a New Bypass Process?

Rather than view these risks as reasons to abandon new governance, we might think of them as opportunities to consider how aspects of new governance can address even the most contentious social issues. This section attempts to help illustrate how a collaborative approach might apply to the interactions of local actors implementing consent and notice standards. The approach described here will not work in every jurisdiction because the professionals involved, their interests and roles, and the law that sets boundaries for innovation varies.

When viewed at the level of local, informal negotiation, the interests of those that interact with pregnant minors may have more in common than one

---

[341] Cohen, *supra* note 327, at 539–40 (describing how "new governance efforts to empower citizens to instrumentalize their interests and achieve their ends are also themselves practices of power intended to shape and constrain these interests and ends").

[342] *Id.* at 539–40.

[343] *Id.* at 541.

would suspect.[344] Many judges are committed to upholding the law and have an interest in defending the reputation of the judiciary. They may have a related interest in making the bypass less of an administrative burden. For the judges who have had little or no training on parental involvement laws, they may want to avoid reversal by an appellate court. Clerks seek clarity about the duty to keep bypass files confidential, and with full dockets to manage, they may also have an interest in creating an effective process. Likewise, lawyers have limited time and may have inadequate information about how to represent minors. They too have a need for a clear and expeditious process.

Clinic personnel are similarly invested in developing an efficient process and fully understanding the law, although concerns about liability may inform their interest. Providers need assurances that assistance they give to minors seeking a bypass will not be used to accuse them of coercion or as evidence of complicity if parents sue under consent or notice laws.[345] Social workers and school counselors who advise minors may have a similar interest in avoiding institutional liability or reprimand from their supervisors.

The overlapping needs of these actors focus on procedural clarity, security in sharing information, and reducing logistical burdens. These interests come together in the creation of specific tools that ease procedural and informational obstacles, such as checklists for clinical intake staff, model court forms and available instructions, and technological aids.[346] Experimenting with technology, like using teleconferences for hearings, can offer the added advantage of being able to keep pace with the evolving needs of a jurisdiction.[347]

New governance strategies suggest not only identifying interests but also delineating roles according to the resources available. For example, roles for clinical and legal professionals may align along the general duties of managers, information brokers, data collectors, monitors, and catalysts.

The group or individual in the management or oversight role must have the veneer of authority to coordinate between professionals who voluntarily participate in reform.[348] Judges often have that legitimacy, and one committed judge can change the culture of a local system. For example, a judge

---

[344] *See* NeJaime, *supra* note 17, at 336 ("New Governance also distinguishes itself from informal justice regimes, such as mediation, alternative dispute resolution (ADR), and arbitration."). Future research might usefully consider how to marry informal governance and new governance. One interesting area of inquiry is health care decision-making and delivery for minors in state or foster care.

[345] *See supra* Part II(B) (provider practices that reflect liability fears) & Part III(C) (legislative proposals that heighten the liability concerns of providers).

[346] *See* BYPASSING JUSTICE, *supra* note 9, at 55. Interestingly, the Alaska notice law provides for a teleconference for a minor who is unable to attend a hearing—an argument for the potential of shaping legislative language, despite the doubts expressed in Part II of this Article. ALASKA STAT. § 18.16.010(n)(4) (2010).

[347] *See Second Generation Employment Discrimination*, *supra* note 274, at 516 (describing the influence of technology in shaping employer accountability).

[348] *See, e.g.*, *id.* at 498.

could serve as the hub of a county's bypass process by ensuring that the clerks in her court know how to handle a bypass; establishing a routine for hearings on which the lawyers that appear routinely before her rely; and opening channels of communication with local providers about the documentation the court needs (proof of completion of counseling requirements, for example).[349]

Lawyers serve as a natural conduit for information about the gap between the text and practice of law. They have experience in interpreting statutory language, and they are in courts, representing minors in bypass hearings, as law is applied. Lawyers acting as information brokers might ensure that clinics, clerks, and judges are aware of changes in the law and of practices that affect law's implementation—alerting providers or advocates, for example, when a judge or clerk retires. Moreover, lawyers' professional networks are often well-positioned to influence how the legal system works. For example, in one state, lawyers volunteered to serve on the court rules committee and helped draft rules that made the bypass petitioner's tasks less complicated.[350] In another state, lawyers worked through their bar council to train volunteer attorneys for bypass hearings.[351]

Clinics also collect data, but the information they maintain is of a different kind. Minors seeking an abortion often contact providers first, so clinic staff may have the most knowledge about who needs a bypass and why.[352] Providers could serve as the liaison between the public interests of the legal system (concerned with the fairness of the process) and private interests geared toward advocating on behalf of the young woman (focused on the subjective experience of the minor). Clinic counselors or education specialists can help minors understand what courts will require and assist lawyers in understanding their clients' particular needs or perspective. Similarly, a sympathetic staff member at a high school or community center could help canvass the opinions of minors about the parental involvement process in order to inform collaboration among clinical and legal professionals.

Finally, pro-choice groups have an interest in making sure the system actually provides abortion access for minors, and youth advocacy groups have an interest in young women's rights to autonomy. These interests underscore a role for monitoring the efficacy of collaboration and providing a catalyst for reform.[353] As monitors, they can verify that information is up to date and that different system participants are fulfilling their roles. Like

---

[349] Interview with Judge (Nov. 14, 2008).

[350] Interview with Lawyer (Sept. 3, 2008); *see also* BYPASSING JUSTICE, *supra* note 9, at 29.

[351] Interview with Lawyer (July 7, 2009).

[352] BYPASSING JUSTICE, *supra* note 9, at 34.

[353] *See id.* at 56 ("In some locations it might make the most sense for statewide civil-rights groups, youth advocacy organizations or women's rights nonprofits to take a coordinating role . . . .").

clinics, they can ensure that whatever system is in place takes account of the particular needs of marginalized minors and meets the broader interests of social justice.[354] As catalysts, non-profit advocacy organizations can start a conversation about the need for change, perhaps supported by private funding that can create the procedural and informational tools described in this section.

New governance supporters argue that procedure and rules can help police a collaborative process and assure participants that power imbalances do not distort participation.[355] The text of parental involvement laws can be hospitable ground for new governance solutions. Too commonly, perhaps because of losses in courts and statehouses, the letter of the law has been the enemy of reform. Yet consent and notice statutes confer broad discretion to clinics and courts through terms like "reasonable means" or "maturity." A new collaborative process might make the most of this discretion in order to open access points to the legal system, while maintaining statutes' ability to reign in potential abuses.[356]

Conclusion

New governance may not be the perfect fit for parental involvement laws. Power differentials, lack of will, entrenched debates about abortion, and problems of transparency are formidable obstacles. But, at present, the alternative appears to be living with a status quo that only enables adversarial positions of individuals or entities to ossify and poses significant costs to pregnant young women.[357] Collaboration might help "elaborate" norms from the bottom-up, so that the values sabotaging effective abortion access for minors change gradually.[358] Viewed in this way, new governance embeds an ambitious, problem-solving agenda that can influence behavior at the margins with an eye toward moving to the center.[359]

---

[354] Some state advocacy organizations, for example, provide funding for lower income minors or transportation for rural minors. *See, e.g.*, Emergency Medical Assistance Inc., http://www.emawpb.org/whoweserve.html (last visited Oct. 31, 2010) (providing funding and possibly travel expenses for minors and adult women).

[355] *See* Cohen, *supra* note 327, at 533 (noting that new governance theorists argue that collaboration can be a fair process through procedural safeguards).

[356] *Renew Deal*, *supra* note 265, at 392 (noting that areas where law has been difficult to enforce can be a tool for "law-in-action flexibility").

[357] *Id.* at 394–95.

[358] *See Second Generation Employment Discrimination*, *supra* note 274, at 555.

[359] *Id.* at 471, 520 (advocating a problem-solving model).